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LAW REPORTING*

ENGLISH REPORTS.—(*Contd.*)

The importance of English Reports can best be realised by knowing what part English Law has played in moulding the law in India and I shall deal with that aspect of our subject in to-day's lecture.

It is believed that the English Law was introduced into the Presidency Towns by the charters of the various Mayor's Courts. It was a matter of acute controversy in Calcutta, at one time, whether Statutes up to 1726, the date of the earliest charter or those up to 1774, the date of the Regulating Act, were introduced and on this turned the legality of the famous Nanda Kumar conviction. The extent to which English Law was introduced was the subject of discussion in the celebrated case of *Mayor of Lyons* v. *The East India Company*(1) where Lord Brougham indicated his opinion that the native inhabitants were governed by their own laws and that English Law applied only to British subjects and other foreigners who sought the protection of the factories but even in their case good many parts of English Law which from their nature were unsuited to the conditions of the colonies could not be taken to have been so introduced. He accordingly held that the Mortmain Act and the Statute incapacitating aliens from holding land did not apply to Calcutta. So far as the natives of India were concerned, the Supreme Court in the first few years of its existence took the view that the English Law applied to them as well and, in consequence, the Statute of 1781 (21 Geo. III, c. 70, s. 17) prescribed that in all questions of succession and inheritance to all rents and goods and in all matters of contract between party and party

*The twelfth of a series of lectures arranged by the University of Madras delivered by Mr B. Sitarama Rao, Vakil, High Court.

1. (1837) 1 M I A 175.

the Hindus must be governed by Hindu Law, Muhammadans by Muhammadan Law and where parties belonged to different religions the defendant's law should govern the case. This rule was re-enacted in the High Courts Charter Act and finally in S. 112 of the Government of India Act.

So far as the mofussil Courts were concerned Reg. III of 1793 directed that where no specific rule existed, the Courts should decide according to "justice, equity and good conscience". The same rule is repeated in the Bengal Civil Courts Act (XII of 1887).

Similar was the course in Madras and Bombay, but both in Madras and Bombay no attempt seems to have been made at any time to apply the English Law as such to natives of India. For the mofussil Madras Regulation II of 1802 prescribes the same rule as the Bengal Regulation which has been repeated in the Madras Civil Courts Act.

In Bombay, the Bombay Regulation IV of 1827, c. 26 indicated the order of precedence among the various sources of law thus: Statutes, Acts and Regulations, local usage, the law of the defendant, in the absence of any of these, justice, equity and good conscience. Somewhat similar provisions are to be found in the other Civil Court Acts, some placing more emphasis on custom than others. The operation on the one hand of the rule as laid down by Lord Brougham that Statutes and Rules of English Law manifestly inapplicable to Indian conditions should be excluded and on the other of the rule early recognised that the words justice, equity and good conscience meant rules of English Law if found applicable to Indian circumstances [*Varden Seth Sam* v. *Luckpathy Royjee Lallah* (2), *Dada Honaji* v. *Babaji Jagushet* (3) and *Waghela Rajsanji* v. *Shekh Masludin* (4)] and the undesirability of having different rules in the same country one for the mofussil, another for the Presidency Town and one for the natives and another for the Englishmen had the happy result of picking out the universal element from the technical and the accidental in the English Law and evolving a new law called by Phear, J., Indo-English Law better and more equitable in many respects than the English Law. The growth of the Indian law bears resemblance to the growth of the Urdu

2. (1862) 9 M I A 303. 3. (1865) 2 Bom. H. C. R. 36.
4. (1887) I L R 11 Bom. 551 (P C).

language as described by some historians. It was the result of the intercourse between the Muhammadan conquerors with their Arabic and Persian and the native inhabitants with their Hindi. At first broken Hindi on one side and broken Arabic and Persian on the other; out of them gradually evolved a language of considerable beauty and power, the modern Urdu. The administration of English Law was in the commencement of the British Rule mostly in the hands of amateur lawyers who however much regard they might have had for it, had but slight acquaintance with its intricacies and whose familiarity with the usages and the customs of the place was equally slight. In the beginning but bad English Law and equally bad Indian Law, it grew into the present system by a process of natural selection which was all for the best and in this process of the building up of the law the greatest praise is due to the eminent lawyers who sat in the Privy Council and whose judgments are reported in the Moore's Indian Appeals, who were able to rise above the narrow technicality of their law and base their judgments upon the fundamentals of the English Law. It may be partly due to the fact that the Judges were mostly equity lawyers who had no great regard for the refinements of the Common Law.

In *Param Shook Doss* v. *Rasheed Ood Dowlah Bahadoor* (5) it was held that Lord's Day Act was totally unsuited to the conditions of Madras. "The fact that a great majority of the Queen's subjects would be amenable to the general provisions of the Act every Monday morning for not attending the Church under 3 James II. c. 4, for selling goods, working at their ordinary callings, etc., will probably satisfy most minds that such a Statute is manifestly inapplicable". So said Justice Holloway. It was also held that the English Law of process never was the law of the Court, the old charters authorising the Government to make the rules and a rule of the Supreme Court made the practice of the Queen's Bench the law of the Court only so far as the same was applicable. In *Ram Coomar Coon Dos* v. *Chunder Canto Mookerjee* (6) the Privy Council held the rule as to champerty and maintenance to be inapplicable to India for the following reason: "The English statutes on the subject were passed in early times mainly to prohibit high judicial officers and officers of State from oppressing the King's subjects by main-

5. (1874) 7 M H C R 285.
6. (1876) L R 4 I A 23 : I L R 2 C 233 (256) (P C).

taining suits or purchasing rights in litigation. No doubt, by the Common Law also, it was an offence for these and other persons to act in this manner. Before the acquisition of India by the British Crown, these laws, so far as they may be understood to treat as a specific offence the mere purchase of a share of a property in suit in consideration of advances for carrying it on without money had become in a great degree inapplicable to the altered state of society and of property. They were laws of a special character, directed against abuses prevalent, it may be, in England in early times, and had fallen into at least comparative desuetude. Unless, therefore, they were plainly appropriate to the condition of things in the Presidency Towns of India, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British Law." They went on to say "the condition of the Presidency Towns, inhabited by various races of people and the legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Muhammadans and Hindus by their own laws and usages or where only one of the parties is a Muhammadan or Hindu by the laws and usages of the defendant furnish reasons for holding that these special laws are inapplicable to the towns." Further on they say "It would be most undesirable that a difference should exist between the law of the towns and the mofussil on this point. Having regard to the frequent dealings between dwellers in the towns and those in the mofussil and between native persons and those in the mofussil and between native persons under different laws it is evident that difficult questions would constantly arise as to which law should govern the case." I have made somewhat copious extracts from the judgment of their Lordships because it contains an exhaustive statement of the considerations that weigh on a question like this. The view taken in this case was followed by the same tribunal in *Raghunath* v. *Nil Kanth* (7) and *Achal Ram* v. *Kasim Husain Khan* (8) and *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (9). In *Yeap Cheah Neo* v. *Ong Cheng Neo* (10) Sir Montague Smith delivering the judgment of the Judicial Committee of the Privy Council said "whilst English Statutes relating to superstitious uses and to mortmain ought not to be imported into the law of the colony, the rule against perpetuities

7. (1893) I L R 20 C 843 (P C). 8. (1904) I L R 27 A 271.
9. (1908) I L R 35 C 420.
10. (1874) L R 6 P C 381 at p. 394.

was to be considered to be part of it. This rule which certainly has been recognised as existing in the law of England independently of any Statute, is founded upon considerations of public policy, which seem to be applicable to the conditions of such a place as Penang as to England, *viz.*, to prevent mischief of making property inalienable unless for objects which are in some way useful or beneficial to the community. It would obviously be injurious to the interests of the island if convenient for the purposes of trade or for the enlargement of town or a port could be dedicated to a purpose which would for ever prevent such a beneficial use of it. The law of England has however made an exception also on grounds of public policy in favour of gifts for purposes useful and beneficial to the public and which in a wide sense of the term are called charitable uses and this exception may properly be assumed to have passed with the rule into the law of the colony." In *Abdul Kawder* v. *Muhammad Mera* (11) it was held following a case in *Ebrahim Sahib* v. *Nagasami Gurukal* (12), a case from the mofussil which discussed the whole law on the subject, that the English rule that the remedy by a way of a suit for an act which is also a felony is suspended till the defendant is prosecuted for the offence did not apply to the Presidency Town either. In *N. Appa Row* v. *V. Appa Row* (13) the law of attainder was held inapplicable to Indian conditions being feudal in its origin and an incident of the relationship of landlord and tenant and not sovereign and subject. For the same reason, that is to say, that it was a highly technical rule of feudal origin, rule in Shelly's case has been held inapplicable to Parsis in the mofussil. In *The Advocate-General of Bengal* v. *Ranee Surnomoyee Dossee* (14) their Lordships of the Privy Council had to consider the question whether the English rule of forfeiture in the case of suicide or *felo de se* applied to Calcutta. Their Lordships held it did not. Their Lordships held that the English Criminal Law did not apply at all to natives and even if it did, it was subject to necessary limitations and qualifications for instance, non-liability for bigamy or to forfeiture on suicide but they leave the question open as to whether some British subjects may not be subject to the law.

In applying the English law as a rule of equity and good conscience, the caution applied by their Lordships in *Srinath*

11. (1881) I L R 4 M 410. 12. (1881) I L R 3 M 9.
13. (1893) I L R 16 M 384 : 3 M L J 80. 14. (1863) 9 M I A 387.

Roy v. *Dinabandhu Sen* (15) may be repeated here. "In proposing to apply the rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social and historical conditions to which that rule is to be adapted." Acting on this rule their Lordships refused to apply certain of the English rules as to waters, diluvion and fisheries. In another case the application of the English rule as to the incapacity of unincorporated bodies like villagers having rights of property of easement or profits *a prendre* is deprecated *Bholanath* v. *Midnapore Zamindary* (16).

The rule of English Law as to forfeiture of tenancy on denial of title has been held to be consistent with justice, equity and good conscience and applied to India [*Maharaja of Jeypore* v. *Rukmini Pattamahdevi Garu* (17)] though the application has not been wholly without protest. In the case of mortgages, with a provision that in default of payment, the transaction should be treated as a sale the Courts in India thought that they were at liberty to apply the English rules of Equity but the Privy Council pointed out that the rules of Equity come in only in the absence of specific rules and, there being customary rules, it was not open to the Courts to innovate by appeal to principles of equity in *Pattabhirama Aiyar's Case* (18). But the delay in passing the judgment made it difficult to go back on the rule laid down by Courts and the Courts have stuck to the new rule with the sanction of the Privy Council itself. *Thambusawmi Moodelly* v. *Hoosain Rowther* (19). In the case of carriers, the Common Law has been applied and the Privy Council held in *The Irrawaddi Flotilla Co.* v. *Bugwandas* (20) that those rules were unaffected by the Contract Act. Again, referring to the statute relating to fraudulent conveyances, their Lordships said in *Abdul Hye* v. *Mir Mohammad Mozaffar Hossain* (21) "Whether or not that Statute 13 Eliz. c. 5 (which may not extend to or operate in the mofussil in India) is more than declaratory of the Common Law so far as it avoids transactions intended to defraud creditors, there seems to be no doubt that its principles and the principles

15. (1914) I L R 42 C 489 : 27 M L J 419 (P C).
16. (1904) I L R 31 Cal. 503.
17. (1918) I L R 42 M 589 at 598 : 36 M L J 543 (P C).
18. (1870) 13 M I A 560.
19. (1875) I L R 1 M 1 (P C). 20. (1891) I L R 18 C 620 (P C)
21. (1883) I L R 10 C 616 at 624 (P C).

of the Common Law for avoiding fraudulent conveyance has been given effect to by the High Courts of India and have properly guided their decisions in administering law according to equity and good conscience."—Lord Fitzgerald. In *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (22) in applying the rule of English Law as to accretions of certain purchases by a mortgagee to the mortgaged estate, their Lordships of the Privy Council say "If the principle invoked depend on any technical rule of English Law it would of course be inapplicable to a case, determinable like this on broad principles of equity and good conscience. It is only applicable because it is agreeable to general equity and good conscience. And again if it possesses that character, the limits of its applicability are not to be taken as rigidly defined by the course of English decisions although these decisions are undoubtedly valuable in so far as they recognise the general equity of the principle and show how it has been applied by the Courts of this country." Arguing on reasoning analogous to that contained in the qualification made by their Lordships, the Madras High Court was prepared to extend the doctrine of salvage to an extent not recognised by English Law but recognised by the Irish Courts *Rajah of Vizianagaram* v. *Rajah Setucherla Somasekhararaz* (23). In *V. H. Lopez* v. *E. J. Lopez* (24) a Full Bench of the Calcutta High Court while applying the English rules as to marriage to a European (not a British subject) declined to apply the rule as to deceased wife's sister. In *Parvathi* v. *Mannar* (25) the Madras High Court declined to apply the English rule that slander is not actionable except in special cases without proof of special damage on the ground that the distinction made between libel and slander under the English Law is not "founded on natural justice and should not be imported into the law of India". The Calcutta High Court takes a different view in this matter. The English rules as to torts have been generally accepted in this country with the rule of absolute privilege for parties, Counsel, etc. The Courts are divided on the question whether the Common Law can be considered to qualify the Penal Code. A recent instance of recognition of Common Law right is that in a Madras case where the right of arrest by a private man of a disorderly person was upheld. The rules as to construction of Statutes, that is to say, those of the fundamental rules such as

22. (1879) I L R 5 C 198 (P C). 23. (1900) I L R 26 M 686 (F B).
24. (1885) I L R 12 C 706 (F B). 25. (1884) I L R 8 M 175

that that construction should be adopted which gives the best effect to the intention of the party [*Chunnilal Parvati Shankar v. Bai Samrath* (26)] cannot differ according to climate and of course bind equally in England and India.

The way in which English Law has affected the growth of Hindu Law may now be considered. Take, for instance, the judgment of L.J. Knight Bruce in *Soorjemoney Dasee's case* (27) "Whatever may have been formerly considered the state of the law as to the testamentary power of Hindus over their property that however has now long been recognised and must be considered as completely established. This being so, we are to say whether there is anything against public convenience, anything generally mischievous or anything against general principles of law in allowing a testator to give property whether by way of remainder or by way of executory bequest (to borrow terms from the Law of England) upon an event which is to happen if at all immediately on the close of the life in being. Their Lordships think there is not; there would be great general inconvenience and public mischief in denying such power and it is their duty to advise that such power exists." Again, in *Wamanrao Damodar v. Rustomji Edalji* (28) where the question was as to whether *powers* should be recognised in Hindu Law their Lordships say The remaining question is whether his power to designate the person (to take) by her will is contrary to any principle of Hindu Law. Their Lordships think that the law as to adoption shows that such a power as that in question is not contrary to any principle of Hindu Law. Further they think that the reasons that have led them to testamentary power becoming a part of the Hindu Law are applicable to this power and it is their duty to hold it to be valid. But whilst saying that, they ought also say that, in their opinion, the English Law of powers is not fit to be applied generally to Hindu wills. In the *Tagore case,* (29) Justice Willes says "whilst however rules of detail, prevailing in England are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists and to which resort must be had in deciding several questions of an elementary character which have been strongly argued in this case and as to which there is no precise authority."

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26. (1914) I L R 38 B 399 : 26 M L J 647 (P C).
27. (1862) 9 M I A 123.
28. (1896) I L R 21 B 702 at 703. 29. (1872) 18 W R 359 at 364.

These rules are said to be:

(1) A man cannot create new form of estate or alter the line of succession.

(2) The rule as to beneficent construction of wills.

(3) Disregard of clauses repugnant to the estate conferred.

(4) The rule that children include those in embryo.

"The law of will has, however, grown up so to speak naturally, from a law which furnishes no analogy but that of gifts and it is the duty of the tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have heretofore prevailed in like cases. The rule of jurisdiction in new cases was stated by Lord Wensleydale in the opinion delivered by him as a Judge in the House of Lords in *Mirehouse* v. *Rennell* (30) in accordance with principles generally recognised. "This case," said Lord Wensleydale, "is in same sense new, as many others are which continually occur, but we have no right to consider it because it is new as one for which the law has not provided at all; and because it has not yet been decided to decide it for our selves according to our judgment of what is right and expedient. Our Common Law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents and for the sake of attaining uniformity, consistency and certainty we must apply those rules where they are not plainly unreasonable and inconvenient to all cases which arise and we are not at liberty to regret them and to abandon all analogy to them in those to which they have not yet been judicially applied because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to us to be of great importance to keep the principle steadily in view not merely for the determination of that particular case but for the interests of law as a science." Though this may all be good English Law it can hardly be said to recognise the principle laid down in *Bhyah Ram Singh* v. *Bhyah Ugur* Singh (31) "The Hindu Law contains in itself the principles of its own exposition. Nothing from a foreign source should be introduced into it, nor should Courts interpret the text by the application of the language of strained analogies".

Certain rules of English Law have been applied as based on general principles and certain,

30. (1833) 1 Cl. & F 527 at 546. 31. (1870) 13 M I A 373 at 390.

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others not, as based on artificial rules. The rule that when a grant is made to two people jointly and one of them cannot take, the other will or when a particular estate fails, the ulterior estate takes effect and the rule that a person cannot approbate and reprobate and the principle that no man will be permitted to take advantage of his own wrong have been held as applicable to Hindu Law as to English Law. But it is no new doctrine that "rules established in English Courts for construing English documents are not such as applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention and the applicability of many such rules depend upon the habits of thought and modes of expression prevalent among those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing and the success of these rules in giving effect to the real intention of those whose language they are used to interpret, depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind accordingly framed with the knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus who view most transactions from a different point of view, think differently and speak differently from Englishmen and who have never heard of the rules in question" or as put in *Norendra Nath Sarcar* v. *Kamalbasini Dasi* (32) "to construe one will with reference to expressions of more or less doubtful expressions to be found in other wills is for the most part an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardly be desirable. To search and sift the heaps of cases which cumber our reports in order to understand and interpret wills of people speaking a different tongue trained in different habits of thought and brought up under different conditions of life seems almost absurd." When asked to uphold an executory bequest which would be valid under the English Law their Lordships said "It would be to apply a very false and mischievous principle if it were held that the nature and extent of the power can be governed by any analogy of the law of England. Our system is one of the most artificial character, founded in a great degree on feudal rules,

32. (1896) I L R 23 C 563 : 6 M L J 71 (P C).

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regulated by Acts of Parliament and adjusted by a long course of judicial decisions to the wants of a state of society differing as far as possible from that which prevails among Hindus in India." Tenancy by entirety and joint tenancy have for this reason been found against by their Lordships of the Privy Council in *Jogeswar Narain Deo* v. *Ramchandra Dutt* (33). The Hindu Law of Religious Trusts are not governed by English law but in the carrying out of them some of the English rules have been adopted by the British Courts.

The combined operation of the rule of exclusion of English Law based upon its unsuitability, the diversity of views upon the subject and the general inefficiency in the legal sense of the judicial officers went to make the Law necessarily very uncertain. To remedy this defect, 3 and 4 Will. IV C. 85, S. 53 provided for the appointment of a law commission with a view to the enacting of laws "that may be applicable in common to all classes of the inhabitants of the said territories, due regard being had to the rights, feelings and usages of the people.". The first commission composed of Macaulay, Macleod, Anderson and Miller met in 1834 and under the instruction of the Local Government prepared a draft Penal Code. The next Charter Act 16 and 17 Vict. c 95 provided for the appointment of a commission in England to examine the recommendation of the first commission. This second commission composed of Sir John Romilly, M. R., Sir John Jervis and Ryan and others prepared a plan of new system of judicature with drafts of the Codes of Criminal and Civil Procedure. They gave it as their opinion that what India wants is a body of substantive civil law in preparing which the law of England should be used as a basis but which once enacted should itself be the law of India on the subjects it embraced." In 1859, the Civil Procedure Code was passed, in 1861 the Criminal Procedure Code and in 1859 Limitation Act. In 1861 a fresh commission was issued for the purpose in the language of the second commissioners of "framing for India a body of substantive law in preparing which the law of England should be used as a basis." The Commissioners were Sir John Romilly, Earle, C. J., Ryan, Lowe, Willes, J., and Macleod. The Commission was repeatedly renewed. The first report contained the draft Succession Act, the second the draft Contract Act, the third a draft Negotiable

33. (1896) I L R 23 C 670 : L R 23 I A 37 : 6 M L J 75.

Instruments Act, the fifth the draft Evidence Act, the sixth a draft Transfer of Property Act and the seventh related to the revision of the Code of Criminal Procedure. In 1865 Succession Act became the law. In 1865 the Council passed a Marriage Act, in 1866 a Companies Act, in 1868 General Clauses Act, in 1869 the Divorce Act. These codes were drawn up by Sir Henry Maine or under his direction. In 1872 the Contract Act and the Evidence Act became law. In 1877 the Specific Relief Act. The Transfer of Property Act was remodelled to such an extent that only five of the old sections remained. Similarly the Negotiable Instruments Act, the Trusts Act and Easements Act were drafted and all the bills were submitted to a commission composed of Turner, C. J., West, J. and Mr. Stokes. This commission also recommended that English Law should be the basis but that its materials should be recast having regard to the native habits. In accordance with the recommendations, with suitable modification, the Negotiable Instruments Act was passed in 1881, Trusts Act, Transfer of Property Act and Easements Act in 1882. Revised editions of the Codes relating to Companies, Civil Procedure and Criminal Procedure also were passed. The Civil Procedure Code, Criminal Procedure Code and the Companies Act have since had considerable recasting. The substance of all these various Acts is based on English law and the terminology is drawn from English law and subject to the limitations, we have expressed when dealing with precedents, English decisions are of great assistance in interpreting these various Acts.

The Succession Act, for instance, is based on English law, the two chief deviations from the English law being first, in abolishing the distinction between devolution of moveable and immoveable property, second, in abolishing husband's right to the wife's property by marriage and all the rules that grow from that circumstance such as tenancy by entirety, tenancy by courtesy and dower. The rule of intestate devolution follows closely the English rule as to moveables except that the wife inherits the property in the absence of the kindred unlike under English rule under which she gets only half. As regards executors, the right of retainer is taken away and the executor is required to pay creditors *pro rata*.

Special kinds of contracts are still governed by the Common Law such as the law relating to Carriers, Charterparties and Shipping generally. The Contract Act has the reputation of being the most ill-drawn Act. It was based on the Draft Civil

Code of New York and was never subjected to patient, penetrating revision by skilled draughtsmen. The Transfer of Property Act also proceeds on the basis of English Law, of course, with certain modifications but in regard to some branches dealt with, for instance, leases, agricultural leases are still governed by the principles of English law except in so far as local usages affect them. On most subjects our Indian Codes being unlike the English Codes, very meagre frequent resort to Enlgish case-law becomes necessary. The Trusts Act abolishes the distinction between equitable estates and legal estates recognised by English law but which the Hindu law at any rate did not recognise but, in other matters, the English law has been closely followed. The Easements Act is in the main based on the law of England which being according to the draughtsman Mr. Stokes, just, equitable and almost free from local peculiarities had, in many cases previous to the Act, been held to regulate the subject in India. The few deviations that have been made are on points not covered by Indian or English Authority and borrowed from modern jurists. So far as the Specific Relief Act is concerned it deviates on a few points from English Law, for the rest, it closely follows the English rules. These points are said to be according to Mr. Stokes: (1) The Act discards the English doctrine that a contract to be specifically enforceable must be enforceable by both. This is doubtful having regard to the pronouncement of the Privy Council as regards the necessity for mutuality in the case of contracts by guardians of minors. (2) The dismissal of a suit for specific performance bars the suit for compensation. In England, Chancery Courts will not enforce performance of a contractual liability extending over many years. The Specific Relief Act renders it more precise by fixing three years. (3) The Act does not recognise the distinctions between the settlement of moveables and immoveables or the husband's rights over the wife's property. (4) It does not deal with the doctrine of part-performance or laches, on the ground that there is no scope for their application. This assumption does not seem to be right and under the recent rulings of the Privy Council, the doctrine has still operation in India. The Companies Act and the Insolvency Acts like other Acts dealing with commercial contracts follow closely on the lines of English Law and in many cases the Act being drawn almost *ipsissima verba* as the English Acts, the authority of the English cases becomes great. On this the following observa-

tions of Sir Montague Smith dealing with the construction of a Colonial Statute are valuable : "Their Lordships think that the Court in the colony might well have taken this decision as an authoritative construction of the Statute. It is the judgment of the Court of Appeal by which all the Courts in England are bound until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in the colonies when a like enactment has been passed by the legislature the colonial courts should also govern themselves by it. When the English and the Colonial Law is different, the English case-law is not binding on them."

SUMMARY OF ENGLISH CASES.

ACHILLI *v.* TOVELL, (1927) 2 K B 243.

Injunction—Restrictive covenant not to build—Breach by assignee having notice—Mandatory injunction—Discretion of court to award damages in lieu of injunction.

Where there was a restrictive covenant not to build on the adjacent land so as to obstruct or interfere with the light and air to the windows on the plaintiff's cottage and the assignees of the adjacent land having full notice of the covenant chose to erect a wall so as to restrict the light and air to the windows belonging to the plaintiff

Held, that the plaintiff was entitled to a mandatory order to pull down so much of the defendant's wall as materially interfered with the access of light and air enjoyed by the plaintiff. In such a case the court had no jurisdiction or discretion to force the plaintiff to accept damages in lieu of an injunction.

REX *v.* MINISTER OF TRANSPORT. *Ex parte* H. C. MOTOR WORKS, LTD., (1927) 2 K B 401.

*Local Government—Licence to run omnibuses—Failure of applicants to give undertaking to charge minimum fare—Refusal of licence—Appeal to Minister of Transport—Considerations of public policy—*Certiorari *and* Mandamus.

A Municipal corporation refused to grant licences to run omnibuses because the applicants refused to give an undertaking that they would charge certain minimum fares upon their omnibuses which were running along the route upon which trams were running. There was an appeal by the applicants to the Minister of Transport who after holding an enquiry thought fit not to pass any order. It appeared that the Minister

considered it essential in the public interest that some arrangement should be made to discourage the use of omnibuses for the carriage of short distance passengers on that portion of the route served by the tramway system and that in refusing to grant licences he was guided by the question of minimum fares to be charged by the applicants. On two applications being taken against the Minister one for a writ of *certiorari* and another for *mandamus*

Held, that the Minister had acted properly under the circumstances of the case and that the applications were unsustainable.

SUGAR SUPPLY COMMISSION *v.* HARTLEPOOLS SEATONIA STEAMSHIP CO., (1927) 2 K B 419 : 96 L J K B 959.

Shipping—Charterparty—Conclusive evidence clause—Bill of lading—Statement as to quantity not conclusive—Which to prevail—Shortage of goods—No proof of error or fraud—Liability of shipowners.

A charterparty contained the following clause :—" Quantity stated on bills of lading to be conclusive evidence as to number of bags shipped unless fraud or error can be proved." It was provided by a caluse in the body of the bill of lading "that the carrier shall not be concluded as to the correctness of statements herein of .... quantity". A parcel of goods was tendered to the ship and the mate signed a receipt for certain quantity and on that basis the master signed the bill of lading. When the ship arrived at the port of destination the cargo was tallied on discharge and a smaller quantity of goods was found. In an action by the charterers against the shipowners for the value of the shortage

Held, that the conclusive evidence clause in the charterparty was in no way modified by the bill of lading and that the shipowners not having proved any error or fraud were liable in damages for the value of the shortage.

GOSSE MILLARD *v.* CANADIAN GOVERNMENT MERCHANT MARINE, (1927) 2 K. B. 432.

Shipping—Bill of lading—Delivery of goods in damaged condition—Negligence—Onus of proof.

The carrier's failure to deliver the goods in the same apparent order and condition as on shipment constitutes a *prima facie* breach of his obligations, casting on him the *onus* to excuse that breach. The preliminary *onus* is not on the

owner of the goods to give affirmative evidence that the carrier has been negligent. It is enough if the owner of the goods proves either that the goods have not been delivered or have been delivered damaged. The carrier is a bailee and it is for him to show that he has taken reasonable care of goods while they have been in his custody. So if the cause of the damage to the goods has not been ascertained but is left in doubt the carrier has not discharged the *onus* which is on him to negative negligence and hence he must be held liable.

ANGLISS & CO., (AUSTRALIA) PROPRIETARY *v.* PENINSULAR AND ORIENTAL STEAM NAVIGATION CO., (1927) 2 K. B. 456.

Shipping—Bill of lading—Duty to exercise due diligence—Default of ship-builder—Ship rendered defective—Damage to goods—Liability of shipowner.

S. 5 of the Australian Sea Carriage of Goods Act, 1924 provides as follows:—"There shall not be implied in any contract for the carriage of goods by sea to which this Act applies any absolute undertaking by the carrier of the goods to provide a seaworthy ship." Art. 3, R. 1 provides that "the carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy...... and make the holds and other parts of the ship fit and safe for the reception, carriage and preservation.."

The plaintiffs shipped on board the defendants' steamship in Australia some carcases of lamb in apparent good order for delivery at London. The provisions of the Australian Act, 1924 were embodied in the bill of lading. On arrival it was found that one-half of the goods were damaged by oil taint. It was found that the design of the bar and its fitting was inadequate and defective but that these involved no failure of due diligence on the part of any person concerned. It was also found that there was some bad workmanship both in riveting and in fitting the bar to the bulkhead which was entirely the fault of the workmen employed by the builders and could not have been detected by any reasonable care on the part of the defendants. In an action by the plaintiffs claiming damages for alleged breach of contract or breach of duty by the defendants.

Held, by Wright, J., that though the defendants would be liable for the lack of due diligence on the part of their servants, they were not liable for the default of the shipbuilders and

their workmen if they had entrusted the construction work to builders of repute and that consequently the action should be dismissed.

Development of Maritime Law traced.

MIDLAND BANK, LTD. *v.* INLAND REVENUE COMMISSIONERS, (1927) 2 K. B. 465.

Bills of Exchange—Bank issuing receipt forms to customers—Payments made at sight or on demand—Instruments amounting to bills—Liability to stamp duty—Stamp Act, 1891.

Where a bank issued to their customers booklets containing receipt forms somewhat similar in appearance to cheques and authorised them to sign the same and obtain small payments from the bank and the receipts were made payable to the drawer or endorsee on demand or at sight

Held, that the instruments were bills of exchange within the meaning of the Stamp Act, 1891 and that they were chargeable with stamp duty.

REX *v.* ESSEX JUSTICES. *Ex parte* PERKINS, (1927) 2 K. B. 475.

*Criminal Law—Clerk of justices found to have acted as solicitor for party in connected matter—Order of justices if vitiated—*Certiorari.

A solicitor's clerk was consulted by a lady with regard to a deed of separation between herself and her husband. Subsequently a summons for maintenance was heard by the justices at the instance of the wife and the solicitor acted as the clerk of the justices. An order having been passed in favour of the wife the husband applied for a writ of *certiorari* on the ground that the justices' clerk having acted as solicitor for one of the parties took part in the hearing. It appeared that the solicitor was not aware that he had acted for the lady.

Held, that the solicitor was unfit to act as clerk and the writ of *certiorari* must be issued. The question was not whether any injustice was in fact caused to the applicant but whether there was reasonable impression in his mind that justice was not being done. *Held also* that the applicant not having been fully cognizant of his right to take objection to the clerk to the justices acting as such he could not be said to have waived that right by failure to exercise it.

(1924) 1 K. B. 256 applied.

DALE *v.* MITCALFE, (1927) 2 K. B. 491.

Income-tax—Settlement—Accumulations for benefit of person on contingency—Settlement conferring only life-estate—Refund of tax paid—Income-tax Act, 1918, *S.* 25.

S. 25 of the Income-tax Act, 1918 provides as follows:—"Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment..... is of such an amount only as would entitle an individual to total exemption from tax the person shall on making a claim...... be entitled to have repaid to him on account of the tax paid".

A settlement provided that the income of certain money was to be accumulated contingently upon a lady reaching twenty-one or marrying. The accumulations were to be capitalized, if they had not been used under the powers of the settlement, and with the capital were to form a fund of which she was to have the interest during her life. The lady on attaining the age of twenty-one years claimed for refund of tax paid.

Held, that the income was accumlated for her benefit : though she got only a life-estate under the settlement and that the tax paid should be refunded to her.

WILLIAMS *v.* SANDERS, (1927) 2 K. B. 498 : 96 L. J. K. B. 912.

Income-tax—Assessment of landlord in respect of house or building—Actual rents paid by tenants as the basis—Income-tax Act, 1918, *Sch. A, No. VII, R.* 8 (*c*).

No. VII, R. 8 (*c*) of the rules of Sch. A to the Income-tax Act, 1918 provides that the assessment and charge shall be made upon the landlord in respect of any house or any building let in different apartments or tenements and occupied by two or more persons as one entire house or tenement.

Held, that the total weekly rents paid by the tenants for the year constitute the annual value for purposes of assessment and not the hypothetical rent that a middleman will pay for the entire tenement.

MACKENZIE-KENNEDY *v.* AIR COUNCIL, (1927) 2 K B 517 (C. A.)

Crown—Air Council—Action for tort against—Maintainability.

Held, that the Air Council is a Department of State and that an action for tort is not maintainable against that body.

PATRICK *v.* RUSSO-BRITISH GRAIN EXPORT COMPANY, LTD., (1927) 2 K. B. 535.

Sale of goods—Breach of contract—Re-sale contemplated—Damages—Loss of profits on re-sale recoverable.

The sellers sold to the buyers a certain quantity of Russian wheat at a certain price delivery to be made at a certain date. It appeared that it was in the contemplation of both parties that the wheat would probably be re-sold by the buyers who were merchants and as a matter of fact the buyers soon after re-sold the goods at a slightly increased rate. Subsequently the sellers informed the buyers that it was impossible for them to perform the contract and no delivery was ever made. It was found that on and after the date of the breach by the sellers it was impossible to obtain Russian wheat in the market. In an action by the buyers for damages, *held,* that the loss of profit on re-sale was recoverable.

Per Salter, J.—"It is not necessary, in order to entitle the buyer to recover loss of profit on re-sale, that the seller should have known, when he sold, that the buyer was buying to implement a contract already made, or that the buyer would *certainly* re-sell ; it is enough if both parties contemplate that the buyer will *probably* re-sell and the seller is content to take the risk."

MESSAGER *v.* BRITISH BROADCASTING CO., (1927) 2 K B 543.

Copyright—License to perform opera in theatres—Assignability—Broadcasting as infringing copyright—Damages—Copyright Act, 1911, *S.* 1.

The plaintiff gave *E,* a well-known theatrical producer. certain rights in a comic opera called "*The Little Michus*". The agreement while conferring on *E* the exclusive right of performing the play in certain countries reserved the copyright for the plaintiff. Throughout the document the words "licensors" and

"licensee" were expressly used and no mention was made of the executors or assigns of *E.* After *E's* death his representatives licenced the defendants to perform the play by broadcasting it. A broadcasting performance was given in the defendants' private studio and although the public were not admitted thereto the performance was rendered audible to the public by means of electrical instruments. In an action by the plaintiff claiming damages for infringement of copyright

Held, by McCardie, J. (1) that the defendants gave a performance "in public" within the meaning of S. 1 of the Copyright Act, 1911 and that there was an infringement of copyright; (2) that the agreement gave rise merely to a license of a limited character enabling the licensee to perform the opera at theatres and that a wireless performance was not contemplated; (3) that the license resting as it did on personal considerations of skill and confidence terminated with the death of the licensee and was therefore not assignable; (4) that the plaintiff was entitled to damages on the basis of the injury actually caused to his performing rights.

REX *v.* DORA HARRIS, (1927) 2 K. B. 587.

Criminal Law—Witness—Judge when may call after close of defence.

The presiding Judge at a criminal trial has the right to call a witness not called by either the prosecution or the defence, and without the consent of either the prosecution or the defence, if in his opinion such a course is necessary in the interests of justice. But the Judge ought not to exercise the right affter the close of the defence unless some matter arises *ex improviso,* which no human ingenuity can foresee and which can be answered by contrary evidence on the part of the Crown.

Reg v. *Frost,* 9 C & P 129 applied.

CLARK *v.* WESTAWAY, (1927) 2 K. B. 597.

Criminal Law—Illegal betting—Conviction under Betting Act, 1853*—Subsequent conviction under Finance Act,* 1926, *for same offence—Legality*—Autrefois convict.

Where the accused who carried on business as a bookmaker without a certificate was convicted and sentenced under S. 3 of the Betting Act, 1853 and subsequently he was once again convicted under S. 17 of the Finance Act, 1926 for the same offence

Held, that there being nothing in the later enactment to exempt persons already convicted under other statutes there was no room for a plea of *autrefois convict* and that therefore the second conviction was sustainable in law.

Saunders v. *Baldy*, L. R. 1 Q. B. 87, relied on.

In re LANYON ; LANYON. *v.* LANYON; (1927) 2 Ch. 264.

Will—Construction—Partial restraint of marriage—"Blood relation" who is—Defeasance clause to operate on marriage of legatee with blood relation—Validity.

A testator directed that his trustees should stand possessed of his residuary estate upon trust to pay the income to his son the defendant for his life, and on his decease upon trust, to pay the capital to his child or children and equally between them if more than one "provided he (the defendant) does not marry a relation by blood. . . . . . And in the event of my son not leaving a child or children surviving him who shall live to attain the age of twenty-one years, or in the event of his marrying a blood relation" then upon certain other trusts. The testator having died the trustees took out a summons to have it determined who were "blood relations" and what were the consequences of the defendant marrying a blood relation.

Held, by Russell, J. (1) that the word "blood relation" does not mean statutory next of kin but a person who stands in lawful descent from a common ancestor; (2) that although the clause in the will relating to marriage gives rise merely to a partial restraint of marriage it is void because it is impossible to ascertain definitely that a particular lady is not a blood relation; (3) that the effect of the defeasance clause assuming it to be valid in law will be to defeat the interests of children of the defendant and not to defeat his life interest.

In re WILLIAMS, PUBLIC TRUSTEE *v.* WILLIAMS, (1927) 2 Ch. 283.

Charity—Bequest for assisting education of candidates for Holy Orders in Church of England-Whether amounts to a charitable gift—Provision for alteration of objects of trust—Effect.

The testator, a clerk in Holy Orders, conveyed his estate to the Public Trustee and directed that it should be constituted a fund and the income should be utilised by a named Board of

Trustees for assisting the education of candidates for Holy Orders in the Church of England. By a subsequent clause he provided as follows : "If for any sufficient reason. . . . the trustees decide that the interests of the church would be better served by any changes in the method of administering or even in the object to which the fund is applied such changes may be made . . . ."

Held, that the will contained a valid charitable gift and that the same was not rendered void by reason of the power conferred on the trustees to alter the object to which the fund was applied.

Nature of charitable gifts discussed by Clauson, J.

In re : FORDER, FORDER *v.* FORDER, (1927) 2 Ch. 291 (C. A.)

Will—Construction—Forfeiture clause to take effect on bankruptcy—Bankruptcy and subsequent annulment—Moneys available for payment during interval—Forfeiture to take effect.

A will contained a forfeiture clause to the effect that the legatee's interest should be forfeited on his becoming bankrupt. *E* who acquired an interest under the will became bankrupt but the bankruptcy was subsequently annulled. Between the date of adjudication and the date of annulment there were in the hands of the trustees moneys available for payment to the beneficiary but payment was not in fact made.

Held, by the Court of Appeal reversing a judgment of Clauson, J., that the forfeiture clause took effect and that the subsequent annulment did not have the effect of rendering it inoperative. The latest date for the annulment of bankruptcy to be effective would be a date just prior to the time when there was some payment of income that could be rightly made and rightly received.

In re, DAVIS'S TRADE MARKS. DAVIS *v.* SUSSEX RUBBER CO., LTD., (1927) 2 Ch. 345 (C A).

Trade Mark—Word 'Ustikon' registered and used as trade mark—Evidence showing same to be distinctive—Word also descriptive—Effect—Use of word 'Justickon by rival trader—Infringement of trade mark—Trade Marks Acts, 1905 *and* 1919.

The plaintiff, a manufacturer of rubber soles, had got the word 'Ustikon' registered as his trade mark. After he had

carried on business using the said mark for some time, in the course of which he made substantial sales, the defendant adopted the word 'Justickon' for use in connection with their manufacture of similar goods. In an action by the plaintiff to restrain the alleged infringement of his trade-mark it was contended on behalf of the defendants that the word 'Ustikon' was merely a misspelt combination of the words "you stick on" and was not distinctive of the plaintiff's goods. It appeared from the evidence that the name used by the plaintiff was in fact adopted and used to distinguish his goods.

Held, by the Court of Appeal affirming a decision of Russell J., that the mere fact that the word 'Ustikon' was descriptive of the goods did not render its registration as distinctive of the plaintiff's goods invalid in law, and that the use of the word 'Justickon' was liable to mislead and was therefore an infringement of the plaintiff's trade mark.

In re A DEBTOR, (1927) 2 Ch. 367 (C A).

Contract—Loan—Secret commission paid by lender to borrower's agent—Effect—Debt whether can be the basis of receiving order in bankruptcy.

A secret commission paid to the borrower's agent by the lender without the borrower's knowledge is corrupt under the Prevention of Corruption Act, 1906, so as to render the contract voidable at the instance of the borrower and the debt cannot form the basis of a receiving order in bankruptcy.

JOTTINGS AND CUTTINGS.

"Punch's" Legal Advice.—Rarely indeed can one convict *Punch* of legal error; its staff of learned clerks appears to be very well versed and grounded in legal principles. Even a law lord may make a mistake, and no harm done; but *Punch* is different; its legal reputation, like the honour of a lady or a Prime Minister will bear no partial diminution. And when it is about to offer legal advice it would be wise if it followed one of its own famous precedents, and didn't.

"Mens Conscia Legis ; or, Every Man his own Lawyer,' considers the position which may arise in consequence of the fact that some legal knowledge is now required for admission to sundry trades and other occupations; it foresees in verse an ever-lengthening queue of lean-faced lawyers waiting for the dole; and it advises women thus:

"For women too must learn the lawyer's jargon.
Oh, tackle contracts in your early teens !
'Twill be no use looking pretty if you haven't studied *Chitty*
And don't know what "reversionary" means;
So dig your comely noses into *Stephens,*
Or soon you'll be out-distanced in the race;
However well you play an' sing, read up the New Conveyancing,
And understand the 'Rule in Shelley's Case.'"

—*The Law Journal,* November 12, 1927, p. 347.

Don't.—Now if the "tinker, tailor, soldier or sailor" who wrote that unlicensed verse had not mentioned the new conveyancing in the penultimate, we could have forgiven him for the last line. Whether or not "the Rule in Shelley's Case" is "the same as the Rule in any other case, for the law is no respecter of persons" as an examinee once wrote is no longer matter; for the Rule itself was abolished by section 131 of the "new conveyancing" Act, the Law of Property Act, 1925.

It is too bad that the dear girls consuming so much of their youth in hard reading for the qualifying commercial examination, should have this unnecessary task thrust upon them. Later, if they want to indulge in legal excavations; but not now. And who is Stephens?

—*The Law Journal,* November 12, 1927, p. 347.

Definitions.—Every practitioner knows, and appreciates, the reluctance of His Majesty's Judges to venture upon anything like an exhaustive definition of any word or phrase left by the legislature undefined. Those mysterious experts whose duty it is to catch the meaning of the Government and crystallise the same in some form of apparently intelligible words are prone to leave as much as possible to judicial erudition and imagination. One cannot blame them. Nor can one blame the Judges for their shyness; or for confining their interpretation "solely to the facts before them."

"Insane" and "drunk" are notorious examples of the undefined. The law relating to trade unions has furnished many; and the latest Act will supply many more. When the Judges are "up against it," they do their best within the limits of each succeeding case. So Roche, J., has recently in part defined "Employment in Agriculture" within the meaning of

the Unemployment Insurance Acts; in the case before him it was essential to do so to that extent; and because it was not really necessary, the Court of Criminal Appeal, failing the early authorities, has refused to explain the legal meaning of a "newly born child" within section 1 (2) of the Infanticide Act, 1922. The Court saw a simpler way out; and they took it with a firm tread.

—*The Law Journal,* November 12, 1927, p. 347.

The Value of Free Legal Advice.—When, a few days ago in the Chancery Division a witness informed Eve, J., that the parties had sought the advice of a weekly journal, that eminent Judge observed that free legal advice was generally very poor stuff. It is a demonstrable fact that Eve, J., did not refer to the *Law Journal* in this general observation; but as a generalisation his statement is undoubtedly true. It is credibly stated that an eminent Judge has at various times delivered himself to a friend *ex tempore* of opinions of no legal value; and eminent counsel have not been guiltless in this respect. "That opinion," said Sargant, L. J., of one given by a barrister to a friend for nothing, "was worth just what was paid for it."

Yet must we not forget the good opinions delivered freely or frequently by counsel for Poor Persons. I have seen such opinions prove their worth in action; and have seen a Poor Person after a long day's trial, go home with a good judgment for a thousand pounds, while the poor barrister returned fee-less to his chambers.

—*The Law Journal, N*ovember 12, 1927, p. 348.

Asleep on the Bench.—A "Law Officer" has recently written of Judges who had the habit of appearing to slumber on the Bench. He observes that this judicial sleep, like Stevenson's death, is apparent only; it would be unwise to proceed on that assumption. "The presumed sleep is simply thought; the Judge has closed his eyes; he wishes to obliterate everything around him, as if in prayer." All very well; and I can bear testimony to the fact that some Judges, like the late Bray, J., were very wide awake during this seeming somnolence.

On the other hand, there have been Judges who have slept indeed. What of Coleridge, L. C. J., as sound a sleeper as ever sat upon the Bench? When asked how his friend Coleridge was, Mathew, L. J., was able to assure the anxious

enquirer that the Chief Justice had "quite recovered from his insomnia". "It is true that Lord Chief Justice Coleridge was also present"—words used in the Court of Appeal by Upjohn, K. C.—were not spoken of a Judge awake.

—*The Law Journal,* November 12, 1927, p. 348.

Lord Birkenhead's Lost Patent.—In calling aloud the name, titles and additions of Lord Birkenhead at the Abercorn Rooms the other day, the toast master made a regrettable but not a calamitous mistake in referring to his Lordship as a K. C. Lord Birkenhead observed, in putting the matter right, that if he desired again to practise at the Bar, it would be necessary to approach his old friend the Lord Chancellor and obtain from him a fresh patent as King's Counsel. There are instances of a Master returning to practise at the Bar; and very remote precedents of Judges who, on being removed from the Bench, have sadly returned to practise. There is no precedent in modern times for such a return by a Lord Chancellor; and it may be assumed that Lord Birkenhead, save only in circumstances so extreme and remote as to be unthinkable, will not return to the Bar; although he has apparently considered how it should be done.

—*The Law Journal,* November 19, 1927, p. 368.

Lord Hewart on Insanity and Crime.—Lord Hewart's lecture, which we report on another page, delivered before the Medical Society of London last week, if it is not exactly an irenicon to the doctors, yet puts with absolute clearness the points of difference as to the legal and medical views of insanity and crime. In effect it was a repudiation of the plea of uncontrollable impulse advocated by the British Medical Association before Lord Justice Atkin's Committee of 1922-23 on the Criminal Responsibility of the Insane—the Committee was appointed in consequence of the outcry raised by the reprieve of Ronald True—and adopted unanimously by that Committee. We need not go back to the rival view advanced before the Committee by the Medico-Psychological Association. That body would have abrogated the Rules in *Macnaughten's Case* (1843, 10 Cl. & F 200) altogether, and substituted an inquiry, based on medical evidence: (1) was the prisoner insane; (2) if so, was the crime nevertheless unrelated to his mental disorder? That appears to represent the

extreme medical view. The British Medical Association were more conservative. They adopted the test in *Macnaughten's Case*—was the accused labouring at the time under such a defect of reason as (1) not to know the nature and quality of the act he was doing, and, (2) if he did know it, then not to know that he was doing wrong? But they added a third test: Was he prevented by mental disease from controlling his own conduct? If so, he was not to be responsible when the absence of the power of control was the direct and immediate consequence of his own default. Lord Justice Atkin's Committee accepted this further test, saying: "It was established to our satisfaction that there are cases of mental disorder where the impulse to do a criminal act recurs with increasing force until it is in fact uncontrollable." And they added: "The suggested rule postulates mental disease; and we think that it should be made clear that the law does recognise irresponsibility on the ground of insanity where the act was committed under an impulse which the prisoner was, by mental disease, in substance deprived of any power to resist".

—*The Law Journal,* November 26, 1927.

Uncontrollable impulse.—This is the view which the Lord Chief Justice combats, fortified, perhaps, by the knowledge that it is opposed to the law as now administered—though not, without hints of judicial dissent—in the Courts over which he presides, and which cannot be altered save by Act of Parliament. He recapitulates the tests we have shortly summarised above. To establish a defence on the ground of insanity there must be proved: (1) disease of the mind; (2) consequential defect of reason; (3) resulting in either (*a*) ignorance of what he was doing, or (*b*) ignorance that it was wrong. Lord Hewart's objection to the new test suggested by the British Medical Association is that, if adopted, it would abolish both branches of test (3) in his statement. If uncontrollable impulse is admitted and is proved, ignorance of the nature of the action and ignorance that it was wrong are alike immaterial. It is enough that by mental disease the accused had no power to resist. And his objection, we gather, lies in this: that while tests (3) (*a*) and (*b*) are proper and sufficient in the great majority of cases, the new test, even if found as a fact, would apply in too few cases to make an alteration of the law expedient. With this alteration, the practical tests now applied would be replaced by a general

inquiry as to irresistible impulse. We doubt whether the opposite school—represented, we may perhaps say, by Lord Justice Atkin—would admit this. The present tests would remain for ordinary cases; the plea of uncontrollable impulse due to mental disease would be available if appropriate. In Lord Hewart's view, the same end is already attained by a verdict of "guilty but insane". He was one of the opponents of Lord Darling's abortive Bill of 1924 to give effect to the Report of the Committee, and at present that Report has made no headway. But the controversy cannot be considered as closed. The Rule in *Macnaughten's Case*, it may be observed, have no binding force in themselves. They only rank as *obiter*. Their force springs from their adoption by the Courts.

—*The Law Journal*, November, p. 370 26, 1927.

A Knightly Thrust.—Passages of arms between Bench and Bar, on those occasions when such regrettable incidents occur, are rarely so witty or so pleasant as that which happened some years ago between Darling, J., who, shortly before had been made a Privy Councillor, and Sir Albion Richardson, an "utter" barrister upon whom the honour of knighthood had about the same time been conferred.

Darling, J., in a case in which Sir Albion appeared, continued to address him as Mr. Richardson, until at last the Associate stood up and whispered a correction in the Judge's ear, whereupon the Rt. Honourable Mr. Justice Darling thus spoke: "You see, Sir Albion, things have altered very greatly since my young days at the Bar. Then it was not usual to confer knighthoods on junior barristers, but only on law officers and others of the highest eminence". "And your lordship will also recollect," replied Sir Albion, "that in your young days at the Bar it was not customary to make puisne Judges Privy Councillors." Darling, J., accepted this retort with due acknowledgement—"a knightly thrust."

—*The Law Journal*, November, 26, 1927, p. 392.

Humour off the Bench.—When all is said, the absence from the King's Bench of anyone with any pretensions to the title of judicial humorist is a loss to be deplored. Surely, in our day, there must be some eligible candidate, one who combines in his own person the qualities of a sound lawyer with judicial gifts and a controlled sense of humour? Not one who

will jest in season and out of season, but who will on fitting occasions illumine what is so dark and dismal in the dreary courses of the Law. Court IV, with all respect, is admittedly not what it was; better perhaps, but certainly duller since Darling J., retired. There are discerning people who did not approve of all the interjections of that famous Judge; but they candidly admit the merit of the remainder. There must be someone at the Bar who possesses the sovereign gifts of wit and legal wisdom, and who might carry on the great tradition of those eminent Judges who could make a timely jest. Chancery, is better off than Common Law at this moment; but a laugh in Chancery, though pleasing, is not at home; it sounds therein like an ecclesiastical offence.

—*The Law Journal*, Dec. 3, 1927, p. 413.

McCardie, J., on Case Law.—There was an obvious appropriateness in the subject—"Case Law"—selected by Mr. Justice McCardie for his lecture at University College, London, on Wednesday, for the learned lecturer's own judgments show that he is a master of his subject as few judges have been. But really the subject was larger than the title indicates. The modern rule of precedents emerged towards the end, but Mr. Justice McCardie's object was rather to impress on his hearers the historical and social value of the mass of judicial decisions which began with the Year Books. The binding nature of decisions is, in his view, of comparatively recent origin. "Probably it was not until the latter part of the 19th century that our present doctrine of strict adherence to prior decision was fully established." It may be so, though we imagine current belief would put it much earlier. But case law is the vehicle by which the Common Law has been developed, and, apart from the social life which the early reports, like no other records, reveal, in the Common Law—to use Mr. Justice McCardie's words—"are to be found in conspicuous degree those elements of history, of broadening freedom, of commercial expansion, and of practical wisdom which give life and fascination to the whole range of English Law." His welcome quotations from Lord Bowen's address to the Birmingham Law Students' Society in 1884 recall a Judge who is remembered with peculiar warmth of feeling by the older generation of lawyers. Bowen's judgments, as in the *Maxim-Nordenfelt Case* and the *Mogul Case*, were masterpieces of judicial reasoning, but

he himself was greater than his judgments. But we cannot follow Mr. Justice McCardie through his lecture. From the Year Books, which, as he cites from Pollock and Maitland "should be our glory, for no other country has anything like them," he comes down to modern times, and his complaint of our system of case law—so far as he has a complaint—is that it tends to become too crystallised. Is the Common Law still capable of growth? We touched on the subject last week in referring to Lord Hewart's after-dinner speech on the Law Merchant. The matter, as Mr. Justice McCardie says, lies with the higher tribunals. "Unless appellate tribunals admit the principle of growth and change, little can be done by Judges of first instance". That is the problem which always confronts the Judge who thinks he sees his way to a useful broadening of an old rule while it is being applied to new facts. We note with interest Mr. Justice McCardie's reference to Mr. Allen's recent work, "Law in the Making,' a remarkable and very valuable addition to a subject which, as the writings of J. C. Gray, Salmond, and Prof. Holdsworth show, has aroused great interest in recent times.

—*The Law Journal*, Dec. 10, 1927, p. 419.

Costs of Litigation.—During the course of the Lords' debate on the Landlord and Tenant Bill, Lord Buckmaster again drew attention to the prevailing high costs of litigation, and observed that, in the disputes contemplated by the Bill, the fees of expert witnesses and the necessary costs of counsel might be such as to rob victory of its spoils. He did not suggest a remedy; and Lord Sumner took the gloomy view that costs, like the poor, are always with us, and he did not know how the evil could be cured, except by the abolition of litigation. There can be no doubt that the increased costs of litigation have resulted in great injury not only to litigants, but to members of the legal profession. Yet two observations may be made as to the items of costs referred to by Lord Buckmaster. The magnitude of experts' fees is a matter outside the control of those who are responsible for the administration of justice. The fees paid to Counsel are largely determined by the litigants themselves. Competent Counsel are available for fees which are certainly not excessive as compared with those charged by members of other professions; and if a client insists on the services of what are called

"fashionable" counsel, that is matter for the exercise of his own discretion. In the press comment which has appeared on the subject, it is generally assumed that Counsel's fees are the main item in a bill of costs. As a general rule, they make up a comparatively small percentage of the bill. On the other hand, Court-fees have greatly increased, and it may well be asked whether the administration of justice should be made a source of public revenue. It is also well known that costs are often greatly augmented by unpenalised interlocutory applications of a frivolous character. The time is certainly ripe for authoritative investigation and inquiry into the whole subject.

—*The Law Journal*, Dec. 17, 1927, p. 449.

BOOK REVIEWS.

THE PROVINCIAL INSOLVENCY AAT, by A. C. Ghose, M.A., B.L., Vakil, High Court, Calcutta. Published by M. C. Sarkar & Sons. Price Rs. 5.

This is a most useful commentary on an enactment of almost daily use. Almost every provision of the Act has come up for consideration before the Courts and the case-law has grown so much in volume that notwithstanding the best efforts of the author, he has not found it possible to compress the size of his work any further. One feature of the work that we should draw particular attention to is that the author has not merely given reference to the cases, but has, when necessary, given his own opinion upon them. His frank expressions of opinion are sure to provoke thought and take the work out of the category of the mere digest type of publications. The appendices give the rules framed by the various High Courts under the Provincial Insolvency Act. We would, however, suggest that the English Bankruptcy Act on which the Insolvency Acts in this country are largely based may be given as an appendix as many of the leading decisions in this branch of law are given by the highest Courts in England and they cannot be correctly understood without reference to the enactments on which they are based. We have no doubt that the volume under review will be found useful to all those having to do with this branch of the law.

THE PRESIDENCY TOWNS AND PROVINCIAL INSOLVENCY ACTS: A Comparative Study, by Ranjitlal H. Pandia, *Bar-at-Law*, Bombay. Price Rs. 2-8-0.

A comparative study of the Presidency and Provincial Towns Insolvency Acts is necessary as they differ in many particulars and unless they are kept in view one is apt to take the decisions given under the one enactment as applicable to the other, overlooking the difference. The author has given the sections of both the Acts in juxtaposition, so that the reader may compare them and note the points of difference between them. The notes deal with both the enactments giving reference to the decided cases wherever necessary. Though the work is mainly intended for students it will also be found useful by the beginners in the profession. The rules framed by the High Courts have been incorporated in the body of the commentary at their proper places to enable the reader to obtain a comprehensive view of the subject. The first twenty-one chapters of the work give a clear view of the law on the subject with reference to the sections of the Act in the author's own words in the natural order of the subjects dealt with.

MADRAS ACTS, CRIMINAL, PART II.

We are glad to acknowledge the receipt of the Madras Acts (Criminal), by P. Hari Rao, B.A., B.L., High Court Vakil, Madras, published by T. A. Venkasawmi Rao, Law Book-seller and Publisher, Mount Road, Madras.

CURRENT INDIAN STATUTES, 1927.

We are glad to acknowledge the receipt of the Current Indian Statutes for the year 1927 published by the Manager, Lahore Law Times, containing the Acts of the Supreme Council with commentary, important Notifications by the Government of India and Statutes concerning British India by the Imperial Parliament.

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THE RULE AS TO BACK-ACCOUNTING BY TRUSTEES.

In suits under S. 92 of the Civil Procedure Code, where a general account of the rents and profits of the trust estate is asked for, the question may frequently arise within what period of time the account should be directed backwards. S. 10 of the Limitation Act of 1908 provides that a suit of that kind against an express trustee in whom the property is vested is not barred by any length of time. It is open to doubt whether the section will apply to a suit against the shebait of a temple because property is not *vested* in him on trust [see *Vidya Varuthi* v. *Balusami* (1) and *Ganga Prosad* v. *Kuladananda* (2)], but it will apply to cases where properties are conveyed to trustees for religious or charitable objects such as a temple kattalai, dharmasala or chatram. Where in such cases the trustees are proved to have acted *bona fide* but mistakenly in the application of the trust funds the English rule as to back-accounting can be applied. The rule was recently applied by a Bench of the Madras High Court in the Kalpathi ease [*Kelu Achan* v. *Sivarama Patter* (3)].

In England, as in India, except in specific cases provided for by the Trustees Act of 1888, no fixed limit is laid down as to the period during which charity trustees would be ordered to account. The general rule there is that the account should be taken from the time when an inexcusable and unexplained misappropriation of the trust fund commenced. [*A. G.* v. *Newbury Corporation* (4). See also Tudor on Charities and Mortmain, 6th Ed., p. 238, and Law relating to Administration of Charities, 3rd Ed., by Bourchier-Chilcot, p. 124.] But

1. (1921) L R 48 I A 302 at 315 : I L R 44 M 831 : 41 M L J 346 (P C).
2. (1925) 30 C W N 415.
3. A S No. 390 of 1923.
4. (1838) C. P. Cooper 72 : 47 E R 406.

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the Court of Chancery has always exercised a discretion with regard to the period for which an account should be directed. Thus where trustees are not guilty of wilful misapplication but have acted under a *bona fide* mistake the time at which the maladministration was brought to the notice of the trustees has in general been taken to be the starting point wherefrom the account should be directed. "It is however a great mistake to suppose that the Court has any discretion in determining the right of a charity. The discretion is only in considering how far that right is to be enforced." [*A. G.* v. *Pretyman* (5)].

The earliest traces of the rule as to back-accounting by charity trustees appear in certain judgments of Lord Hardwicke though it is doubtful if it was totally unknown even earlier. For instance, Lord Chancellor King held in *A. G.* v. *Rigby* (6), a case of maladministration of charity funds, that he "would not disturb anything that had been already done" during a period of sixty years prior to the filing of the information. But Lord Hardwicke for the first time assigned reasons for the rule. Thus in *A. G.* v. *Balliol College, Oxford* (7), the Lord Chancellor refused to suffer a retrospect as regards the general account because he said a college stood on a different footing from individual persons and because the *cestui que trust* had acquiesced in its conduct. The rule, however, was more accurately stated and applied by the same eminent Judge in *A. G.* v. *Talbot* (8). There the trustees diverted the trust funds, elected themselves objects of bounty and took the income. It was held that such election was void. As to the claim for a general account the Lord Chancellor said: "Suppose the masters and fellows should have erred in the construction of the statutes, they may have innocently erred, and in such a poor provision as this is, it would be a great absurdity to make a fellow account for commons, etc., which he may have eat upon an imagination he had a right to them." That the general rule is to account from the commencement of the misapplication and that Courts of Equity will not condone maladministration of charity funds apart from *bona fide* mistake is borne out by a judgment of Lord Hardwicke himself. In *A. G.* v. *Corporation of Bedford* (9), the master of a

5. (1841) 4 Beav. 462 : 49 E R 418.
6. (1732) P. Wms. 145 : 24 E R 1005.
7. (1744) 9 Mod. 407 : 88 E R 538.
8. (1734) 3 Atk. 662 : 26 E R 1181.
9. (1754) 2 Ves Sen 505 : 26 E R. 323.

school wrongly took the usher's salary and he was directed to account from the commencement of the misapplication. The Lord Chancellor said: "Though it is said this account will ruin the master, I cannot help that; but must do it for the sake of justice and precedent."

But this branch of the law was far from settled even during the beginning of the last century. Thus in *A. G.* v. *Dixie* (10), the Court ordered an account from the date of the bill in order to save trouble and expense. In *A. G.* v. *The Brewers' Co.* (11), Sir W. Grant pointed out that the law was still uncertain on this point. In directing an account from the time when the existence of the trust was declared by Act of Parliament the Master of the Rolls said: "No trustee can be held competent to say he will account only from the time at which a demand is made". Similar questions arose in certain cases which came up before Sir John Leach, V. C. In *A. G.* v. *Joliffe* (12), he recognised the rule that a trustee should not be directed to account for back-rents unless he had acted corruptly with regard to the trust funds. In *A. G.* v. *Corporation of Winchester* (13), he gave his reasons for the rule in the following terms: "There is nothing that can reasonably be called corruption in continuing without inquiry a practice which has continued for centuries; secondly, such an account would defeat some other purposes of the Corporation; thirdly, it is not necessary for re-establishing the charities". Where, however, there was no question of *bona fide* mistake on the construction of the deed of trust or otherwise the Vice-Chancellor was not slow in refusing to exercise the discretion in favour of trustees. Thus in *A. G.* v. *Mayor of Bristol* (14) a general account was directed as regards the entire rents.

With Lord Eldon however we come to a stage when the rule is stated and applied as one based upon some principle. His judgment in *A. G.* v. *Corporation of Exeter* (15) has now become a classic. In that case the information complained that the rents and profits of a charity estate had been misapplied towards certain objects of public utility not contemplated by the author of the trust. It was, however, conceded (16) that the mode

10. (1805) 13 Ves. 519 : 33 E R 388. 11. (1818) 1 Mer. 495 : 36 E R 755

12. (1822) I L J Ch. (O. S.) 43.

13. (1824) 3 L J Ch. (O. S.) 64.

14. (1818) 3 Mad. 319 : 56 E R 522.

15. (1826) 2 Russ 45 : 38 E R 252.

16. *See* the arguments of Sugden in *A. G.* v. *Exeter,* (1827) 3 Russ. 395 at p. 396 : 38 E R 624.

ad administering the charity had gone on unquestioned for centuries and that the trustees had not acted corruptly. In a famous passage the Lord Chancellor stated the law in these words: "With respect to the general principle on which courts deal with trustees of a charity, though it holds a strict hand over them, when there is wilful misapplication, it will not press severely upon them when it sees nothing but mistake. It often happens from the nature of the instrument creating the trust, that there is great difficulty in determining how the funds of a charity ought to be administered. If the administration of the funds, though mistaken, has been honest and unconnected with any corrupt purpose, the court, while it directs for the future, refuses to visit with punishment what has been done in time past. To act on any other principle would be to deter all prudent persons from becoming trustees of charities". To admirers of Lord Eldon the above case is also memorable because the Lord Chancellor resigned his office before delivering final judgment therein. Lord Chancellor Lyndhurst, however, affirmed his judgment and directed an account without prejudice to past application. [See *A. G.* v. *Exeter* (16).] One other judgment of Lord Eldon may also be noted. In *A. G.* v. *The Dean and Canons of Christ Church* (17) [see also the judgment of Sir T. Plumer, M. R., in *A. G.* v. *Christ Church* (18)] the testator directed the trustees to erect a free grammar school and pay the master and usher certain salaries. The trustees built a free school and paid the said persons increased salaries and this went on for nearly a century. On an information the Lord Chancellor held that the trustees had acted mistakenly and directed an account for a period of six years prior to the bill, but he allowed the college the increased salaries already paid on the ground that "the will admitted of a good deal of difficulty in the construction".

A few cases on the other side of the line may also be referred to. In *A. G.* v. *Exeter* (19), a Corporation which had been in possession of charity lands admitted by their answer to the information that they had retained the surplus rents and applied them to corporate purposes distinct from those of the charity, always charging their books of account with the sums so retained. It was held by Sir W. Grant, M. R., on a hearing by

16. (1827) 3 Russ. 395 38 E R 624.
17. (1826) 2 Russ. 321 : 38 E R 356.
18. (1822) Jac. 474 : 37 E R 928.
19. (1827) 2 Russ. 368 : 38 E R 372.

Sir T. Plumer, M.R., on a re-hearing [see *A. G.* v. *Exeter* (20)] and by Lord Chancellor Eldon on appeal that the Corporation must be decreed to account from the commencement of the charity, namely for a period of 200 years. The only order the Lord Chancellor thought fit to make considering the hardship of the case was to refer the matter to the Attorney-General whether it would be proper for the charities to accept a less sum in lieu of its dues. This practice was subsequently followed in several cases. See *A. G.* v. *Corporation of Carlisle* (21), *A G.* v. *Brettingham* (22) and *A. G.* v. *Pretyman* (5). Similarly in *A. G.* v. *Stafford* (23), Lord Gifford, M. R., decreed an account of the charity properties for a period of 35 years commencing from the date at which the accounts set forth in the answer began.

Quite a number of cases were decided by Sir J. Leach, M. R., giving effect to the rule as to back-accounting. In *A. G.* v. *Corporation of Berwick-upon-Tweed* (24), the question arose on the construction of the terms of a will whether the income of certain properties belonged to the Corporation or to the charity and it was ultimately decided that the charity was entitled to it but the account was decreed only for six years prior to the suit because it was found that it was only then the rents were claimed for the use of the charity. Similarly in *A. G.* v. *Stationer's Co.* (25) the court directed an account from the date of filing the information because there was nothing amounting to misconduct on the part of the trustees who had merely acted according to the practice of their predecessors. The Master of the Rolls summarised the rule in the following words in *A. G.* v. *Burgesses of East Retford* (26): "Where the corporators for the time being have no knowledge of the fact that the lands in question were devised for charitable purposes nor had any knowledge of circumstances which ought to have put them upon inquiry into the nature of their title to the lands in question but have *bona fide* followed the practice of their predecessors in the application of the rents and profits either to other charitable purposes not warranted by the will

5. (1841) 4 Beav. 462 : 49 E R 418.
20. (1822) Jac. 443 : 37 E R 918.
21. (1831) 4 Sim. 274 : 58 E R 103.
22. (1840) 3 Beav. 91 : 49 E R 35.
23. (1826) 1 Russ 547 : 38 E R 211.
24. (1829) Taml. 239 : 48 E R 95.
25. (1831) 9 L J Ch. (O. S.) 229.
26. (1833) 2 My. & K. 33 : 39 E R 857.

of the devisor or to the general purposes of the Corporation it appears to me that in such a case there being no wilful breach of trust or improper motive imputable to ancient corporators it would be unfit to compel the corporation to account for and satisfy out of their general corporate property the rents and profits so applied by them before they had notice that the propriety of such application was questioned.... To carry back the account from the commencement of the misapplication in such cases would prove the ruin of half the corporations in the United Kingdom."

In the two Newbury cases however Lord Brougham, L.C., pointed out the need for applying the doctrine within the strictest limits. Thus in *A. G.* v. *Newbury Corporation* (4) in directing an account against the trustees from the date of their appointment he observed thus: "It appears to me very difficult to know, without precedent, how the time of filing the bill should be the period during which the enquiry should be limited. The general period I take to be from the beginning of the breach of trust: but if the trustees can satisfy the Court that they laboured under an ignorance of law or of fact, or of both, they may be excusable in that respect. For example where there is a cramp and difficult deed to be construed. But what the Court is always looking after is, . . when did the misapplication of the funds with the knowledge of the party that he was not excusable commence?" A similar course was pursued in *A. G.* v. *Mayor of Newbury* (27). There the Lord Chancellor pointed out that though corporations should be more leniently dealt with than individual persons there should be no undue relaxation of the principle since that would open the door to boundless abuse. He also pointed out that the diversion of trust funds to other objects would constitute a breach of trust and that the mere fact that the trustees had actually spent away the money would not exculpate them in the eye of the law unless they had been misled.

There is nothing very illuminating in the judgments of Lord Langdale, M. R., on this aspect of the law. In *A. G.* v. *Corporation of Cambridge* (28) he pointed out that where the breach of trust had been innocently committed by persons pursuing the conduct of their predecessors a retrospective account should be avoided if they offered to give every facility to the

4. (1838) C P Cooper 72 : 47 E R 406.
27. (1834) 3 My. & K 647 : 40 E R 246.
28. (1836) 5 L J. Ch. 357.

due application of the trust money in future. A similar view was expressed in *A. G.* v. *Pretyman* (5). In *A. G.* v. *Caius College* (29) the trustees were not surcharged for overpayments made to charitable objects because it was found that they had acted under a *bona fide* mistake. *A. G.* v. *Draper's Co.* (30) was a case of *bona fide* error on the construction of the will persisted in from the commencement of the trust. *A. G.* v. *Cullam* (31), *A. G.* v. *Shearman* (32), *A. G.* v. *Christ's Hospital* (33), *A. G.* v. *Draper's Co.* (34) and *A. G.* v. *Leicester* (35) were the other cases decided by the Master of the Rolls. In the last case, however, an account was directed from the commencement of the breach of trust on the ground that the trustees had acted corruptly and not mistakenly.

In Scotland where the plea of *bona fide perceptio et consumptio* is fully established the rule as to back-accounting has been given effect to as a principle of general applicability. In *University of Aberdeen* v. *Irvine* (36) it was held upon the construction of ancient documents that the increased income of lands dedicated to charity belonged to the charity and not to the trustees but all the same an account was ordered only since the signetting of the summons. The principle was applied to a case other than a charitable trust in the case of *The Lord Advocate* v. *Drysdale* (37). Their Lord Chancellor Cairns stated that "perception and good faith and complete ignorance of an adverse title will be a sufficient defence to any claim for the recovery of the back-rents and profits". In *Andrews* v. *Mcguffog* (38) the *Exeter case* (15) was relied on and it was held that charity trustees should not be made liable to account for ignorant misapplication of funds towards objects not within the charity. It is not the fact of the funds having been expended but the fact that they were spent under a *bona fide* mistake that constitutes the ground for exonerating the trustees*.

*See observations of Lord Watson in *Andrews* v. *McGuffog* ibid, at p. 324.

5 (1841) 4 Beav. 462 : 49 E R 418. 15. (1826) 2 Russ. 45 : 38 E R 252.
29. (1837) 2 Keen 150 : 48 E R 585.
30. (1841) 4 Beav. 67 : 47 E R 263.
31. (1836) 1 Keen 104 : 48 E R 246.
32. (1839) 2 Beav. 104 : 48 E R 1119.
33. (1841) 4 Beav. 72 : 49 E R 265.
34. (1843) 6 Beav. 381 : 49 E R 873.
35. (1844) 7 Beav. 175 : 49 E R 1031.
36. (1868) L R 1 H L Sc. 289. 37. (1874) L R 2 H L Sc. 368.
38. (1886) 11 A C 313.

Quite a liberal application of the rule as to back-accounting was made in the case of the *A. G.* v. *The Master Wardens, etc., of the Wax Chandlers' Co.* (39). There a testator had in the sixteenth century conveyed certain properties to the respondent company on condition of their making certain annual payments towards named charitable objects. At the time of the testator's death the annual income was just sufficient to meet the payments and the cost of repairs. Subsequently the income increased considerably, but the company appropriated the surplus in the belief that the same belonged to them. Towards the end of the eighteenth century they also purchased a piece of land adjacent to the devised land and the two properties were thrown together and built upon. An information filed in 1867 for declaring that the entire income belonged to the charity and that the land newly purchased formed part of the charity property was dismissed by the Master of the Rolls and on appeal by Lord Chancellor Hatherley. When the matter came up before the House of Lords, it was held that the whole income was dedicated to the charity and that the surplus did not go to the company. As regards the property purchased it was held however that it belonged to the company because there was no evidence to show that the charity funds were in fact utilised for the purchase.. An argument of Sir G. Jessel that it should be assumed that the purchase was done with the charity funds was not accepted. As Lord Cairns pointed out: "there is no evidence whatever showing that the property of this charity, specifically, was applied in the purchase. It may well be that the Master and Wardens of the Wax Chandlers' Co., being under the impression that the surplus was theirs and having it along with their other funds, applied some part of it to that purchase; but there is no evidence earmarking, tracing or following the charity money into that purchase. Under those circumstances, to take possession of that new purchase for the purpose of the charity would, as it seems to be, be nothing short of following the back-rents ..... Of course in cases of this kind it has not been the practice of the court to follow back-rents." Similar observations were made by the other Law-Lords.

But Lord Chelmsford went further than the case required and made the following observations :- "If it could have been proved that any part of the original rents and profits had been *expressly applied* to the purchase of the land in question, to take

39. L R 6 H L 1.

it from them now would be virtually to make them account for rents and profits prior to the filing of the information.. a mode of dealing with charitable trustees who had acted *bona fide* but mistakenly as to the charity fund not adopted by the Court of Chancery". This statement of the law is not borne out by principle or precedent. For, if certain moneys of the trust are invested in land they continue in existence in another form and can be traced. If it was supposed that the moneys should be earmarked for purposes of tracing we need only say it is no longer the law in England since the decision in *Halletts's case* (40) and *Sinclair* v. *Brougham* (41).* The doctrine of back-accounting assumes that the moneys have been expended by the trustees either on themselves or on other objects. If it is conceded that they continue to exist in one form or another it is rather hard to believe that even then they should not be restored to the trust. Suppose for instance that in the information it was admitted or proved that a sum of money belonging to the trust was in the hands of the trustee. Could it be said even then that the trust will not be entitled to claim the same? Under those circumstances the amount was directed to be paid to the charity with interest in *A. G.* v. *Corporation of Cambridge* (42). And on similar facts Sir J. Leach, M. R., refused to order the trustees to pay the money into Court only because its existence was brought to his notice after he had passed a decree refusing a retrospective account. [See *A. G.* v. *Corporation of Winchester* (43)].Thus the basis of the decision in *Wax Chandlers case* (39) must be taken to be that there was nothing to show that any funds of the charity were in fact utilised for the purchase of the property in question.

The result of the authorities in England seems to be as follows: The general rule is that trustees should account from the date of the misapplication of charity funds. Where however the trustees have expended the funds under a *bona fide* mistake either because of the ambiguity of the deed of trust or because of the conduct of their predecessors or because of laches or acquiescence on the part of the *cestui que trust* (44) the

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**See* also Article on "The limits of the doctrine of tracing" in 53 M. L. J. 133.

39. L R 6 H L 1. 40. (1880) L R 13 Ch. Div. 696.

41. L R (1914) A C 398.

42. (1836) 5 L J Ch. 357.

43. (1824) 3 L J Ch. (O. S.) 64.

44. *See* Judgment of Lord Campbell in *Bright* v. *Legerton*, (1861) 2 De. G. F & J 604 : 45 E R 755.

court of Chancery has ordered an account only from the date when the fact of misapplication was brought to the notice of the trustees. The date of filing the bill will be material only in this connection. It may also be noted that "the rule applies whether the funds have been applied in attaining objects contemplated by the trust by unauthorised means or whether they are employed for the attainment of objects not within the trusts at all, or whether they have been retained by the trustees for their own benefit, as in cases where there is a *bona fide* question whether the surplus income belongs to the donee beneficially or is applicable to charity"* The rule itself is an application of the doctrine of tracing. It proceeds on the footing that what has been misapplied has been lost or destroyed so as not to be capable of being followed.

In India the rule as to back-accounting was applied by Farran, J., in *A. G. of Bombay* v. *Bai Punjabai* (45). It was admitted in that case that the expenditure of the charitable income was not in exact conformity with the testator's wishes. At the same time it was found that charges of fraud and dishonesty levelled against the trustee were not proved and that the trustee had acted under a *bona fide* mistake. The following observations appear in the judgment: "The evidence does not afford any ground for supposing that *P* has trust property in her hand which it is sought to follow. The claim is now reduced to a simple claim against her as trustee for an account of income and disbursement and for the balance, if any, . . In the absence of proof of dishonesty and fraud no account can be directed against *P.* . . ." The court also found laches and acquiescence on the part of the *cestui que trust* Further it was pointed out that a decree for general account, considering the trouble and expense, was of doubtful utility to the trust. It is however significant to note that in the case of an item of property for which regular accounts were submitted the court ordered the account to be gone into.

The rule was recently applied by the Madras High Court in *Kelu Achan* v. *Sivarama Patter* (3). In a suit under S. 92, Civil Procedure Code, there was a dispute whether the trust was public or private and it was ultimately held that it was public. An account was asked for against the present trustee and it was found that the maladministration was entirely

*See Tudor on Charities and Mortmain, 6th Ed., p. 239.

3. A. S. No. 390 of 1923. 45. (1894) I L R 18 B. 551.

due to his predecessor in office. Their Lordships held that the trust could recover only such moneys as could be traced to the possession of the tarwad, the karnavan of which was the ex-*officio* trustee of the suit temple. It was stated that "it is a general principle also that back-accounting will not be decreed except on proof of dishonesty or malversation". The rule as stated in the above form may not be quite accurate. The correct rule is, that trustees are liable to account for back-rents except in a case where they are shown to have acted under a *bona fide* mistake. On the facts however the rule seems to have been correctly applied. The karnavan who was the *ex-officio* trustee was in no way subject to the control of the uralers and the deceased trustee dealt with the trust funds as his own private property and it was rightly held that the tarwad property should not be rendered liable for his maladministration unless money could be traced into its possession. Of course there could have been no objection to a decree against the trustee to the extent of the assets of the deceased trustee in his hands, but this apparently was not pressed. A general observation is made in the judgment that the present trustees were not liable for the misdeeds of their predecessors. A similar observation was made by Schwabe, C.J., in another Madras case.[See *Doraivelu Mudaliar* v.*Adikesavalu Naidu*(46).]If by this their Lordships meant that there was no question of personal liability it may be true. But if it was intended to lay down that the property which devolved on the trustee on the death of his predecessor was not liable it is obviously incorrect. [See *Vishnu Nambudripad* v. *Sankaran Nambudripad* (47).

In conclusion it may be pointed out that though the English rule as to back-accounting may be applied in India in proper cases as a rule of justice and equity, any undue extension of the rule is likely to lead to dangerous consequences under the peculiar conditions prevailing in this country. As observed by the learned author in his book on Hindu and Muhammadan Religious Endowments(1st Ed.)at p. 318., "In India there is no such public spirit as exists in England and a Hindu taught by nature, religion or other circumstance to be meek is accustomed to look on calmly while maladministration of public property is going on. The individual interest is not affected in such cases and he does not therefore concern himself with anything that does not affect his individual interest." It may also be borne in mind

46. (1922) M W N 620.

47. (1920) 13 L.W 369.

that in India trusteeship is generally vested in individual persons and very often it devolves among members of a family under the hereditary principle. It is needless to point out that chances of mismanagement are greater in such cases than in cases where the office is vested in corporations. Under these circumstances courts in this country will be acting rightly if they proceed with a certain degree of caution in applying the rule enunciated above.

B. V. VISWANATHA AIYAR,
Mylapore. *Vakil, High Court.*

SUMMARY OF ENGLISH CASES.

In re FORSEY AND HOLLEBONE'S CONTRACT, (1927) 2 Ch 379 (C. A.).

Vendor and Purchaser—Contract for sale of property free of encumbrances—Resolution of local authority approving town-planning scheme whether constitutes encumbrance—Contract entered into in ignorance of resolution—Avoidance—Permissibility.

A contract for the sale of certain house property free of encumbrances was entered into and a certain sum was paid as deposit by the purchaser. It appeared subsequently that the local authority had passed a resolution approving of a Town Planning Scheme and that, if put into effect, a portion of the premises in front would be acquired for purposes of extending the road. It also appeared that the parties were not aware of the resolution when they entered into the contract. On a summons being taken by the purchaser for a declaration that the vendor had not shown a good title in accordance with the contract and for refund of the deposit :

Held, by the Court of Appeal, affirming a judgment of Eve, J., that the resolution of the local authority did not give rise to an encumbrance on the property sold, that the vendor had not failed to show a good title and that the deposit need not be repaid by him to the purchaser.

THE FAGERNES, (1927) P 311 (C A).

Shipping—Collision—Territorial jurisdiction—Statement of Attorney-General—Conclusive nature.

Where the question arose whether the Bristol channel, the scene of a maritime collision, was within the territorial jurisdic-

tion of the Crown or not and the Attorney-General appeared on behalf of the Crown and made a statement after consultation with the Home Secretary that the place of collision was not within territorial waters :

Held, by the majority of the Court of Appeal, Bankes, L.J. dissenting, that the statement of the Attorney-General was conclusive and binding on the Court.

Decision of Hill, J., in (1926) P. 185 reversed.

De La Garde *v.* Worsnop & Co., 96 L. J. Ch. 446.

Arbitration—Agreement containing arbitration clause—Determination of agreement by something arising outside the contract and something arising out of the contract itself—Distinction between as regards effect on arbitration clause.

A clause as to arbitration which is contained in an agreement for sale of a business is determined when the agreement itself is determined by something arising outside the contract and consequently any dispute as to the cause of such determination cannot be made the subject of arbitration. But if the agreement is determined by something arising directly out of the contract itself, the arbitration clause is not determined and consequently any such dispute as to the cause of the determination can be the subject of determination.

Burton (James) & Son, *In re,* 96 L. J. Ch. 457.

Company—Allotment of shares before the filing of statement in lieu of prospectus—Validity—Transfer of shares before the filing of statement—Acceptance of certificate and bonus by the transferee subsequent to the filing of statement—Transferee estopped from denying he was a member.

Though an allotment of shares before the filing of a statement in lieu of prospectus is void, still, if the person who has obtained a transfer of the shares accepts a certificate for the shares as well as the bonus declared by the company, he is estopped from saying he is a member of the company.

Baines *v.* National Provincial Bank, 96 L J K B 801.

Banker and Customer—Cheque cashed shortly after closing hour of bank—Legality.

A bank is entitled within a reasonable business margin of their advertised time for closing, to deal with a cheque, not of course in the sense of dishonouring it, but in the sense of doing

that which the cheque asks them to do, namely to pay it. Where the plaintiff drew a cheque on the defendant bank in favour of a third person shortly before 3 o'clock in the afternoon and it appeared that there was insufficient time for the cheque to be presented at the bank for payment at or before 3 o'clock which was the usual hour for closing and as a matter of fact the bank cashed the cheque five minutes after 3 o'clock and debited the customer's account with that sum before he could countermand the cheque the next day:

Held, that the bank was entitled to cash the cheque as it did and debit the customer for the same.

MUSSMAN *v.* ENGELKE, 96 L J K B 824 (C A).

International Law—Ambassador—Privilege—Investigation by Foreign Office—Statement of Attorney-General—Conclusive nature.

Held, that the Attorney-General's statement as to the result of the Foreign Office investigation regarding the question whether a particular person is privileged on account of his being on the staff of the Foreign Embassy is not conclusive and that the court could direct the person pleading privilege to be cross-examined.

DAVIS (H. M. INSPECTOR OF TAXES) *v.* HARRISON, 96 L J K B 848.

Income-tax—Professional football player—Payment of benefit on transfer to another club—Liability to assessment—Income-tax Act, 1918, *Sch. E.*

A professional football player was promised a sum of money by a Football Club at the end of ten years' service. The rules of the club contemplated as a matter of business the power to grant benefits. In the ninth year of his service the player was transferred to another club and he received the sum promised to him the next year by the club to which he originally belonged. The benefit was a simple payment and not the result of public subscriptions.

Held, that the payment constituted income for purposes of assessment to income-tax and that it was by no means compensation paid for loss of employment.

Seymour v. *Reed,* (1927) A C 554 distinguished.

KASLER & COHEN *v.* SLAVOUSKI, 96 L J K B 850.

Sale of goods—Breach of warranty—Action by sub-vendee —Damages whether include costs incurred in defending action— Limitation.

Where a person has made known the purpose for which goods are intended and the purchaser has relied on that implied guarantee, the purchaser may recover not only damages but also costs incurred by a sub-vendee in defending an action. There is no ground for drawing a limitation to the application of the rule where there is a long chain of sub-vendees so long as the same article passes from hand to hand and the breach of warranty relates thereto.

FULLWOOD *v.* HURLEY, 96 L. J. K. B. 976.

Contract—Agent for sale—Vendor's commission—Contract with purchaser for commission—Right to double commission.

A hotel-broker, who was the authorised agent of the vendor for commission, made an offer to an intending purchaser that the purchaser might view the house and that "if business was done, he shall act for him at the usual brokerage". The purchaser looked at the property and ultimately made a contract with the owner under which he bought the house. The hotel-broker received his commission from the vendor. He then brought an action against the purchaser claiming further commission from him on the strength of the letter of offer made to the purchaser.

Held, that the fact that the purchaser accepted the offer to view the house and did not raise any objection to the clause in the letter that the broker shall act for him at the usual brokerage did not create a contract for the payment of such commission and entitle the plaintiff to claim further commission from him, as the plaintiff, as the vendor's agent, had already received commission from the vendor.

Per Lord Hanworth, M. R. :—It cannot be stated too plainly that an agent must not accept commissions from both sides, that, if there are two commissions that are to be received, it must be on the basis of the actual work being done for both parties with the assent of both parties after full knowledge. If such knowledge is afforded and it is made plain what position the agent occupies, then it is possible for the agent to act between the parties; but, if and so long as the agent is the

agent of one party, he cannot engage to become the agent of another principal without the leave of the first principal with whom he has originally established his agency.

ATTORNEY-GENERAL *v.* PAINE, (1928) 1 K B 9(C A).

Insurance (Unemployment)—Failure to pay contributions by the employer—Summary proceedings—Employer ordered to pay a fine to the employees and also to pay contributions in respect of each of the employees during the preceding year of employment—Civil action by the Crown for further unpaid contributions—Right to recover—Unemployment Insurance Act (1920), *S.* 22, *Sub-Ss.* 2, 3, 6.

The defendant employer has been summarily prosecuted under the Unemployment Insurance Act (1920), S. 22 for his alleged failure to pay contributions in respect of two persons employed by him. On the hearing of the summonses an order was made by the Justices requiring the defendant to a pay a fine in respect of each of these two persons, and also requiring him under Sub-section (3) of that section to pay contributions in respect of each of them during the preceding year of the employment. In an action by the Crown in the Civil Court for further unpaid contributions which could not be recovered in the summary proceedings before the Justices, Rowlatt, J., held that civil action for the balance of unpaid contributions is not sustainable. But the Court of Appeal reversed the judgment of Rowlatt, J., and held that an order made in summary proceedings against an employer does not prevent the recovery from the employer of other unpaid contributions in respect of the same employee by means of civil proceedings.

LEWIS *v.* GUEST, KEEN AND NETTLEFOLD, LTD., ETC., (1928) 1 K. B. 20 (C. A.).

Workmen's compensation—Accident in the course of the employment—Disabled to work to a certain extent—Employer giving light work in lieu of compensation—Cesser of the light work owing to general strike—Reviver of right to compensation—Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), *S.* 1—*Workmen's Compensation Act,* 1906, *S.* 1.

Owing to an accident arising out of and in the course of employment, certain workmen received injuries and were unable to continue the work. In lieu of compensation they were entitled to, they were given light work by the employer. Later

on, the employer was obliged to discontinue the services of these workmen owing to some serious situation in the labour market.

Held, the workmen were entitled to be paid compensation although they could not procure employment even if they were not injured.

LIGGETT (LIVERPOOL), LTD. *v.* BARCLAYS BANK, LTD., (1928) 1 K. B. 48.

Banker—Instructions that cheques should be met, provided they are signed by two Directors—Negligence—Cheques payable to trade creditors of the company—Liability of the banker.

The plaintiff company gave instructions to its banker the defendant to honour its cheques provided they were signed by two of its directors. But the defendant bank met some cheques which were signed only by one director, and those cheques were drawn only in favour of trade creditors of the plaintiff company. In an action for money had and received:

Held, on equitable principles, that as the liabilities of the company had not been added to by reason of such payments of the cheques the defendants were not liable and were entitled to stand in the shoes of the creditors whom they had paid.

LEIGH *v.* INLAND REVENUE COMMISSIONERS, (1928) 1 K. B. 73.

Revenue—Super-tax—Interest on bonds—Payment of arrears of interest in one year—Income of year in which payment made—"Receivable", meaning of—Income-tax Act, 1918, *S.* 5, *Sub-sec.* 3 (*c*).

The assessee in August, 1918, bought a number of bonds of a company incorporated under the law of Canada. The bonds bore interest, but at the time of his purchase the interest was unpaid since July 1, 1914. After the purchase, the arrears remained unpaid, and the succeeding instalments of interest remained unpaid until the middle of 1921, when a scheme was adopted and sanctioned by the Court in Canada in that year. In consideration of certain terms as to sinking fund and repayment, the company undertook to pay the arrears of interest and they at once paid the arrears up to 1919, as the scheme provided. The Revenue Authorities had assessed him to super-tax for the next year on the basis that all that interest was income of 1921, and therefore assessable to super-tax for 1922-

23. The appellant (assessee) contended that those payments were "received" but not "receivable" in 1921, that they were "receivable" in 1914 and subsequent years and therefore the liability to super-tax belonged to those years and the sellers of the bonds were in the position of having the income 'receivable' down to 1918.

Held, (by Justice Rowlatt) that the interest on the bonds paid to the assessee in August, 1921, was part of his income for super-tax purposes for the year ending April 5, 1923. For income-tax purposes "receivability" without receipt is nothing and the meaning of S. 5 of Income-tax Act, 1918, must be "receivability" speaking of a debt which has been received, and means the date on which it is paid as distinct from the date on which it was accruing.

KASLER AND COHEN *v.* SLAVOUSKI, (1928) 1 K. B. 78.

Damages—Measure of—Sale of goods—Breach of warranty—Several successive sales—Whether costs incurred in actions between successive vendors can be claimed from the original vendor by the 1st purchaser—Test—Reasonable defence.

The plaintiffs, who were wholesale furriers, bought some dyed rabbit skins from the defendants for the purpose, as the defendants knew, of their being made into fur collars for women's coats. Having made the skins into fur collars, the plaintiffs sold them to a firm *X* who re-sold them to *Y*, who in turn sold to *Z*, a draper. *Z* sold a coat with one of these fur collars attached to it to a lady. The lady on using the collar developed 'fur dermatitis' owing to antimony in the fur and so brought an action against *Z* for breach of warranty on the sale of the coat. Notice of the action was given by *Z* to *Y*, *Y* to *X*, and *X* to the plaintiffs and the plaintiffs to the defendants. A judgment was given against *Z* for damages and also costs. *Z* claimed this amount together with his own costs from *Y* who paid the same. *Y* recovered the amount he gave to *Z* and also his costs from *X*. *X* again recovered the amount he gave to *Y*, together with his costs from the plaintiffs, and, in an action by the plaintiffs against the defendants for breach of warranty on sale of the skins,

Held, that, as there was nothing unreasonable in resisting the original action, the plaintiffs are entitled to recover from the defendants the amount of the damages that the lady recovered in the first action and the amount of costs of that action on both sides, and also costs for each of the intervening parties.

INLAND REVENUE COMMISSIONERS *v.* PAKENHAM, ETC., (1928) 1 K. B. 118.

Super-tax—Assessment—Settlement in favour of an infant—Directions to trustees to apply a part of the income to the use of the infant—Direction for accumulation of the rest—Liability of the trustee for taxation in representative capacity—Income-tax Act, 1842, *S.* 41.

Where properties were settled upon trust with a direction that the trustees were to apply part of the income for the maintenance, education, etc., of the infant and accumulate the rest, and the trustee acted accordingly,

Held, that the trustee was not liable to be taxed in a representative capacity in respect of the entire income from the properties including that which was accumulated and that the proper assessment ought to be upon the amount actually paid over for the use of the infant.

TODD *v.* EGYPTIAN DELTA LAND AND INVESTMENT CO., LTD., (1928) 1 K. B. 152.

Income-tax—Limited Company incorporated and registered under the Companies Act of the United Kingdom—Establishment which the law requires in United Kingdom—Control and management in a foreign country—Directors residing abroad—Residence—Liability of Company to tax—Income-tax Act, 1918 (8 & 9 *Geo.* 5, c. 40), *Sch. D, Case V.*

Where a company, incorporated and registered under the Companies Act of the United Kingdom, has its establishment required by law in United Kingdom but its business is carried on wholly in a foreign country by the directors residing abroad,

Held, that the company can have more than one residence and that for the purpose of income-tax it is resident in the United Kingdom.

Swedish Central Ry. Co. v. *Thompson,* (1924) 2 K. B. 255; (1925) A. C. 495 applied.

GOWAR *v.* HALES, (1928) 1 K. B. 191.

Third party procedure—Motor insurance—Action for damages against motorist—Adding insurance company as party—Rules of the Supreme Court, O. 16, *Rr.* 48 & 52.

In an action for damages sustained through the negligence of a motorist in driving a motor cycle, generally speaking, an Insurance Company in which the motor cycle has been insured ought not to be added as a party.

NANCE *v.* NAYLOR, (1928) 1 K. B. 263 (C. A.)

Landlord and Tenant—Lease—Action for non-payment of rent—Decree for possession, rent and mesne profits in favour of the lessor—Subsequent agreement—Tenant undertaking to give up possession on a particular date—Relief against forfeiture—Competency of the Court to grant—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, c. 49), S. 46.

In an action for ejection for non-payment of rent, judgment was given in favour of the landlord for recovery of possession, rent and mesne profits. The landlord did not act upon that judgment with undue haste, and the tenant was given time to pay rent, mesne profits and costs. It was also notified to the tenant that, if rent and mesne profits and costs were paid, the order for possession would not be executed. The tenant failed to comply with this condition whereupon the landlord decided to execute the writ of possession. But an agreement was entered into between them by which the tenant undertook to pay out the amount of debts and costs under the fi. fa. and to give vacant possession of the premises by a certain date, in consideration of the landlord withholding the execution of the writ of possession. Subsequently the tenant applied under S. 46 of the Supreme Court of Judicature Act, 1925, for relief from forfeiture and Clauson, J., granted the relief.

Held (on appeal by the landlord) that the agreement signed by the tenant did not preclude the court from granting relief against forfeiture.

CORRESPONDENCE.

A LEGAL AID SOCIETY FOR MADRAS.

To

THE EDITOR,

MADRAS LAW JOURNAL.

SIR,

I crave the favour of a corner for the following few lines in your Journal:—

There has been, since 1925, in existence in Bombay a Society called the Bombay Legal Aid Society. The object of the Society is to undertake, promote and develop legal aid work, to encourage the formation of new legal aid organisations and to co-operate with the judiciary, the bar, and all organisations interested in the administration of justice so as to make justice

accessible to the poor and to reduce the costs of litigation. Any person desirous of engaging in any form of legal aid work is eligible for membership. Mr. N. M. Joshi, M.L.A., of the Servants of India Society is the President and Mr. H. A. H. Payne, who is the President of the Bombay Incorporated Law Society, is Vice-President of the Society. The Society counts among its members Vakils, Solicitors, and Advocates besides laymen in sympathy with the movement.

The Society gives free legal advice and assigns from among its members Vakil, Attorney or Advocate to conduct litigation free of charge in those cases in which it is satisfied that the applicant is too poor to pay for such assistance and that he has a case worthy of support. The applicant has to pay only the Court costs and out-of-pocket expenses. If the applicant is too poor to pay even the Court costs, the Society advises and assists him in seeking relief in *forma pauperis*. The Reports of the Society show numerous instances in which but for the legal aid given by the Society, the litigant would have been prevented from obtaining justice. The authorities in the local High Court, Small Causes Court and the Magistrates Courts appreciate the services which the Society by its members is able to render in securing justice for the poor and have permitted boards containing information about the Society to be put up in their respective Courts, and whenever deserving cases come to the notice of the presiding officers, they are made over to the Society. Sir Norman Macleod, the late Chief Justice of the Bombay High Court, who had an opportunity to watch the work of the Society, has contributed an appreciative article on the Society and its work in the current number of the Bombay Law Journal.

I beg respectfully to urge upon your readers the necessity of starting legal aid work on an organised scale in your city. It is always an advantage to have a constituted and recognised Society to which a poor man can have recourse and which, if he can establish his claim to relief, will advise him and, if necessary, procure the proper representation of his case before a Judge or a Magistrate. In a large city like yours there must be a wide scope for such a Society without in any way trenching upon the work done by lawyers in the ordinary course of their business for remuneration.

The formation of a Legal Aid Society in this great city concerns the whole profession and I trust that there may be found members willing to interest themselves in the move-

ment and take early steps to form a Society there. I shall be glad to furnish any further information about the Bombay Society, its constitution, procedure and work, to any of your readers on his writing to me for the same.

Yours truly,

NAYAN H. PANDIA, M.A., LL.B.,
Solicitor, High Court, Bombay,
Honorary Secretary,
THE BOMBAY LEGAL AID SOCIETY.

8th February, 1928,
FORT, BOMBAY.

JOTTINGS AND CUTTINGS.

Maiden Names for Wives.—German women may, says a British United Press message from Berlin, retain their maiden names after marriage, according to the decision of the Berlin Bar Association. But the Berlin lawyers declare that, according to the law, the maiden name must be attached to the husband's name by a hyphen. This is regarded as a concession to "hyphenated feminism." The question arose after a woman lawyer, Dr. Hasslacher-Friedenthal, had been summoned to court and ordered to abandon the use of her maiden name in conjunction with her husband's name. The Bar Association declared, however, that married women may legally employ their maiden name in private life only, and that it is an infringement of the law to use the former name in dealing with Federal, State, or Municipal authorities.—*L. J.*, 1927, p. 466.

Death of Judge after Part-Hearing.—A point of considerable interest was discussed in the Court of Appeal last week, namely, the position arising when the Judge hearing the case dies before its conclusion. The case in question had been part-heard by Fraser, J., when he fell ill and died; and the parties agreed that instead of having the case heard *ab initio,* they would ask Acton, J., to continue the hearing after reading the shorthand notes of the earlier proceedings. The normal course would have been a re-hearing of the whole case; and in

some instances the impression made on the mind of the Judge by the demeanour of the witness would have been an important factor which would not appear in a verbatim report of the proceedings. The parties had, however, agreed as to the course to be adopted; but in the Court of Appeal a doubt was expressed by the Judges as to whether the consent of the parties would avail to regularise proceedings which would otherwise be invalid. Although no precedent could be cited of a similar case, it would be indeed extraordinary if the parties, who could validly come to a settlement at any stage of the proceedings, could not properly agree as to the facts or the evidence upon which the case should proceed from the time of the untoward circumstance of the Judge's death.—*L. J.*, 1927, p. 471.

A Feminine Judge.—A woman has been appointed a Judge in Sweden. Miss Marguerite Trangott, after a university career and practice in the High Courts, now presides at one of the Stockholm Courts.—*L. J.*, 1927, p. 483.

How Judges are chosen.—Were judicial vacancies to be filled by open competitive examination—open, that is to say, to all eligible members of the Bar—it is possible, and perhaps probable, that the names of the successful candidates would not always be identical with those in fact chosen in the prevailing, and in many respects wiser, way. History records that all sorts of considerations weigh with the selectors. The age of the candidate; the nature of his practice at the Bar; if he is an M. P., the security or insecurity of his seat; whether he is in the right line of succession; his merits and his health; and although in a far less degree now than aforetime, his political history.

To be an A.-G.'s Devil is, of course, to be in the right line. Sir Edward Clarke has told of that bright and happy summer morning of June 14, 1879, when, on arriving at his chambers, he found a letter from Holker, A.-G., offering him the post of Devil. He refused; and Holker asked him for the names of the next best. He gave them, and he gave them good; J. C. Mathew and A. L. Smith. But J. C. was not a man of strong physique and was certain of an early judgeship. A. L. was strong, robust, and judicially uncertain.

"Then," said the A. G., "I will give it to him"; and he did.—*L. J.*, 1927, p. 483.

Sir Edward's Pass-Over.—The passing-over of Sir Edward Clarke himself for a Law officership in 1885 was one of the most curious examples of the selective method. Merit and the expectation of the profession pointed to Macnaghten as the new A.-G. and to Sir Edward as S.-G. Macnaghten was senior to Webster and to Clarke; he had, says Sir Edward, a large practice and a safe seat. His qualities were such that he, a Conservative, had been offered a judgeship by a Liberal Government. Giffard, in fact, offered Macnaghten the Home Secretaryship and the reversion of the Chancellorship; but Macnaghten, seeing as in a glass darkly the hale longevity of the future Lord Halsbury, and rightly esteeming the immediate and proximate rewards better than all the uncertain glories of the Giffard reversion, declined the flattering offer.

To Clarke there came no emissary and no offer, and he pulled never a string. What the world expected did not take place. Deeply affected, no doubt, by the reported insecurity of Sir Edward's seat at Plymouth, the selectors appointed Webster A.-G. and Gorst Solicitor; a passing-over which profoundly affected Sir Edward's subsequent career, and afforded, incidentally, a glaring example of the occasional demerits of the selective method.—*L. J.*, 1927, p. 484.

Weak Bench and Strong Bar.—It has recently been written that the High Court Bench is likely to get worse and worse and the Bar to grow better and better; insomuch that the Bench will, in time, be dominated by the overpowering personalities which remain at or within the Bar. The observations were made in connection with the talk about the judicial vacancies and the manner in which they are filled. Men with big practices at the Bar do not want judgeships; what is five thousand as compared with twenty, thirty or forty thousand? Law officers, it was said, would not take an ordinary judgeship; they leave such small matters to the "Devil," and if they cannot get what they want, they continue at the Bar when the Government they serve and adorn goes out after an election.

Yet it does not work out quite in this way. The great Judge is not always, or often, a man who at the Bar commanded

the biggest practice. The conditions referred to have existed for many years; yet the Bench shows nowhere any symptom of being dominated by the big personalities. And in cases where the highly-feed silks have earned big fortunes there is in the Bench an attractiveness and a dignity, a security, and a traditional longevity, which appeals, in time, to most.—*L. J.*, 1927, p. 499.

A.-G.s and Judgeships.—To assume that an Attorney-General has a right to any judicial vacancy, if he desired it, is wrong. According to the best opinions, the Attorney-General has now no right to claim any particular judicial office. From the days of Lord Coke onwards the Chiefship of the Common Pleas was the "pillow of the Attorney-General". But apart from the Common Pleas he was entitled to nothing, and with that Chiefship his pillow disappeared. The Attorney could not demand the Chief Baronship of the Exchequer, nor the Chief Justiceship of the King's Bench, nor the Mastership of the Rolls. Sir W. Garrow, Attorney-General, tried hard, on the death of Thompson, C. B., to secure the Chief Baron's throne, but Lord Eldon was adamant. No Attorney-General, he was able to demonstrate, had been appointed Chief Baron for centuries.—*L. J.*, 1927, p. 500.

Lawyers Avoid Litigation.—Lord Carson had a "running down" experience in which his legal wisdom appeared at a somewhat later stage than in Lord Westbury's case. Presiding at a recent lecture by Mr. D. N. Pritt, K. C., on "The Law of Principal and Agent," he observed that he never realised how difficult that law was until his chauffeur—naturally, a most careful driver—knocked a man down in Regent Street.

He had statements that day from all who were concerned in the accident, and every statement was curiously diverse from all the others on material points. There was, in fact, no agreement even as to the place where the accident occurred, or as to the direction in which any of the witnesses were going at the time. In the circumstances Lord Carson took the only wise and proper course. He made up his mind to pay the man and get rid of the case and have no costs on either side.

There is another unreported case of a legal personage whose car collided with another near a country inn during closing hours on a Sunday afternoon. The inn was locked up and deserted, and a victim of the accident appeared to be on the

point of death. The legal personage did not hesitate: he broke into the inn, removed and carried away some brandy and saved the patient's life. The indignant landlord was subsequently squared, and the felony, if any, compounded.—*L.J.*, 1927, p. 500.

The Future of our Jurisprudence.—"Fictions," observed Mr. Augustine Birrell, Q. C., on December 13, 1900, "have played their part. Judge-made Law has played its part. To Statute Law belongs the future. Let us pray for well-drawn Statutes."

Twenty-seven years have passed; and at the opening of the twenty-eighth, looking calmly and dispassionately at the Books of Statutes, and endeavoruing, so far as in us lies, to remember the Statutory Regulations and the Private Acts, we can only repeat with humility, Let us pray without ceasing: for the need is great. The evidence of the years have proved that Augustine Birrell was not entirely wrong in his reckoning.

Fictions and Judge-made law have played their part ever since. Their usefulness continues to be spent; but they still lag superfluous on the legal stage. Lawyers understood legal fictions; there are probably a few who are not entirely confused by some recent examples of "Judge-made" law; but there is no man living who can declare with certainty the whole meaning of a modern Statute. Those who study Hansard, and observe the man-handling which a Bill receives before it finally emerges, maimed and bleeding, as a Statute, can only marvel that its words are still in some degree coherent and intelligible. Yet to such, said Augustine Birrell, belongs the Future. Let us, indeed, Pray.—L. J., 1928, p. 18.

The President as Journalist.—Lord Merrivale, like Sir Edward Clarke, began his effective career as a journalist; and in 1882, while the famous Q. C. M. P. was engaged on a political tour in the North of England accompanied by his newly-wedded bride, he had "a special piece of good fortune in the admirable reporting of his speeches by a young reporter who was sent by the *Western Morning News*" to accompany Clarke's progress from town to town. The young reporter was Henry E. Duke. "It has been my privilege," observes Sir Edward, "to be of some use to him in the career which, resembling my own in its course through the Reporters' Gallery to the Bar and Parliament led him to the high post of honour and of

danger, the Chief Secretaryship for Ireland"—and later, to the Presidency of the Probate Division and a peerage.

A sound lawyer, Sir Edward describes him, an impressive speaker, calm in judgment, firm in decision, of untiring industry and of unswerving rectitude. The quartette of "younger men," any one of whom Clarke regarded as fully capable of taking his place at the Bar—Rufus Isaacs, John Simon, F. E. Smith and H. E. Duke—all were politicians and, verily, all have "got on". Lord Reading, Lord Birkenhead, Lord Merrivale; and Sir John off to India for glory and back to a peerage, if he wants it.—L. J., 1928, p. 42.

Sir John Simon's Retirement.—It is but a few weeks since Sir John Simon, on his acceptance of the Chairmanship of the Indian Statutory Commission, intimated that this involved only a temporary interruption of his work at the Bar. and that he would resume his practice after Easter. Second thoughts, however, have expanded this temporary withdrawal from work into a definite retirement, and Sir John will not return to practice at the Bar. That the Courts will know him no more would be a rash prophecy. At the age of forty-two he refused the Chancellorship, and incidentally made way for Lord Buckmaster's brief occupation of the Woolsack. That was a choice of a political career which the subsequent course of events did not, perhaps, justify, but there were consolations, and Sir John Simon's return to the Bar gave him an easy predominance in advocacy, and an income, no doubt, commensurate with that predominance. Lord Birkenhead, who ought to know something about these matters, has said that had Lord Buckmaster refused the Woolsack, it is as certain as anything can be that he would to-day be earning an income of 30,000*l*. to 40,000*l*. a year. Sir John Simon did refuse, and the estimate for him could hardly be less. But, as in 1915, so again now, other ideals than the continuance of unrivalled success at the Bar have prevailed, and Sir John Simon will embark on his new career with the good wishes of the whole profession. Immediately it gives him the opportunity of great service in reconciling the benefits of British Government with the aspirations of the Indian peoples. Beyond that it is needless to look, but politics is an uncertain game, and the cold shade of opposition may very well give place in the future to more active responsibility, and to conspicuous achievement.—*L. J.*, 1928, p. 45.

Ex-Irish Judges and the English Bar.—The ruling of the Bar Council, which extends to pensioned ex-Judges of Ireland the right to practise in England under the usual conditions, if they have been called to the English Bar, will probably not lead to any serious invasion from the sister island. Judges who have retired are not usually in the mood for forensic struggles and conflicts. The question arises, now that this concession is made, whether retired English Judges might, without objection, enjoy a similar privilege. The concession would probably be accepted by the Bar only on the assumption that very few would make use of it. It would cause much perturbation if, in addition to the usual competition which comes from below through the Bar Examination, it became the fashion for Judges to retire from the Bench only to resume at the Bar, and so place the rank and file of practitioners between the upper and the nether mill-stones. In former times, of course, when a Judge's tenure of office depended on the continuance of Royal favour, a return to the Bar was not unusual; but between those times and our own there is no comparison.—*L. J.*, 1928, p. 47.

Dock Briefs and Wigs.—Another matter of considerable importance to members of the Criminal Bar was settled by the Bar Council in holding that it is permissible for counsel to leave the Court on hearing a prisoner ask for a dock brief; but that it is improper on such an occasion for a barrister to remove his wig. This finding has met with general approval, as laying down a fixed rule where the former diversity of practice and opinion had led to much discontent. The wig is now so much an established and inseparable accident of forensic costume that its removal in Court, and especially for the purpose of avoiding a dock brief, has been said to savour of indecency. Yet the wig is not as old as the Constitution. The "serious dress" which was considered proper to the Bar in the days of the Commonwealth did not include a wig; that was introduced in the time of Charles II, and counsel have continued to this day the "bands of the Commonwealth with the head-dress of the Restoration". The black robe dates from the death of Queen Mary, and not, as commonly supposed, from that of Queen Anne.—*L. J.*, 1128, p. 47.

K. C.'s £53,000 Fee.—What is believed to be the biggest fee ever paid to a barrister is, says *Reynolds News*, to be given to Sir Leslie Scott, K. C., M. P., for work which he has undertaken in India. He is to receive a fee of 53,000*l.*, with a "refresher" of 200*l.* a day during the three months that he will be away making his total earnings for that short period more than 70,000*l.* Sir Leslie Scott, who was Solicitor-General in 1922, and is among the best-known K.C.'s at the Bar, sailed from London on December 29 to advise the Indian States and Princes as to their legal and constitutional positions with regard to the Statutory Commission now on its way to India.—*L. J.*, 1928, p. 79.

Laughter in (Privy) Council.—The Judicial Committee of the Privy Council is a Board pre-eminent in prestige and impressiveness; and the atmosphere of the little back room in which it performs its high functions is not such as to encourage the spirit of levity. Yet even King's Bench Court IV. was never, even in the happy days of Darling, J., more merry than their Lordships in considering an appeal from British Honduras touching the testamentary gifts of Isaiah Emmanuel Morter to the "Parent Body of the Universal Negro Improvement Association for the African Redemption Fund"; an association which, it was alleged, could not lawfully be the recipient of the gifts aforesaid, by reason of its alleged revolutionary and warlike aims. In proof whereof the Universal Ethiopian Anthem was cited, which spoke of foes and victories, swords and armies and banners.

It was not to be supposed that such a topic would fail to remind Lords Carson, Shaw and Haldane of the revivalist hymns of their happy youth, or of the Salvation Army. Analogies leaped happily to their minds and tongues accordingly; and for a few brief moments the Judicial Committee of the Privy Council may be said to have relaxed.—*L. J.*, 1928, p. 81.

Peculiarities of the Judicial Committee.—There are two peculiarities about the Judicial Committee of the of the Privy Council. In the first place, its decisions are not binding upon other Courts; secondly, a dissenting judgment is an impossibility. In the House of Lords expressed differences of opinion are not uncommon; but in the Privy Council a mem-

ber of the "Board" who does not agree with the majority must forever hold his peace. It never delivers a judgment. The so-called judgment is no more than a statement of the reasons by which the Committee will be governed in tendering advice to His Majesty.

The rule that a joint opinion shall be given without disclosing "how the voices and opinions went" is now 301 years old. It is contained in Article 4 of an Order in Council made on February 20, 1627. But it has been broken on occasion. In a reported case Dr. Lushington intimated that a particular judgment was not unanimous, and after the decision in *Ridsdale* v. *Clifton*, where an appeal by a clergyman who had offended in matters of ritual was dismissed, Sir Fitzroy Kelly, C.B., allowed it to be known that he was not of the same mind as his colleagues.—*L. J.*, 1928, p. 81.

BOOK REVIEWS.

THE ADVOCACY SERIES, VOL. I—ILLUSTRATIONS IN CROSS-EXAMINATION, by Messrs. P. Ramanatha Aiyar and N. S. Ranganatha Aiyar. Price Rs. 4.

It is with pleasure we welcome the first volume of the Advocacy Series entitled "Illustrations in Cross-Examination" written jointly by Messrs. P. Ramanatha Aiyar and N. S. Ranganatha Aiyar, with a foreword from the pen of the Advocate-General of Madras. Looking at the outstanding figures as appellate lawyers and also the comparatively few instances of note among lawyers conducting original suits, we cannot but be sorry to trace the cause to the want of proper training and healthy leadership. It is perhaps this which has prompted the authors of this book to collect illustrations of the best English and American advocacy and present them to the members of the legal profession. Originality and intuition, better cultivated by the lawyer who conducts trials, may get chastened by his going through the pages of this book which contains some of the rare achievements in the field of cross-examination. Records have been left to us of the advocacy of men like Scarlett and Sir Charles Russell, no mean personalities, and it is an inordinate joy to be impressed with their splendid performances. The variety of methods of cross-examination, of which this volume is full, brings home the fact how great is the art and how much genuine study on our part a subject as this deserves. The arrangement

of the subjects is really fine and is made quite interesting by the choice gleanings from famous trials. Indeed, the select passages from the writings of men like Cox, Harris, Elliott and Wills regarding the principles that an advocate should place before himself in order to achieve his end are so ably brought in as to leave scarcely room for us to doubt the statement that "How difficult the art of cross-examination is, only those who have tried can appreciate". The book, as it is, supplies even to the most careless reader matter for interest. As we skip from one subject to another, the specimens of some of the past-masters in that art really enliven us and we are all the better in spirits after closing the book.

Though we are handicapped by the dearth of records of Indian advocacy, we feel that the few scrappy informations we have, may well be given a place by the authors of this book in the volumes yet to see the light of day. We are sanguine of the enthusiastic reception this book will get from the legal world.—K. C.

THE TRIAL OF ADELAIDE BARTLETT. Edited by Sir John Hall, *Bart.* Notable British Trials Series. Published by Messrs. Butterworth & Co., Ltd. Price Rs. 6-8-0.

"The Trial of Adelaide Bartlett," edited by Sir John Hall, narrates in the introduction the facts of the case, which are quite alluring, since "there is a peculiar fascination about a case of poisoning". The rest of the book sets out fully the trial, which yields to none of the previous volumes of the British Notable Trials Series, in its valuable instructions to the lawyer, seeking guidance in the great arts of cross-examination and forensic eloquence. Indeed, we do not seek Mr. Edward Clarke in vain for a quick perception of the smallest details when cross-examining witnesses, or for the brilliant effects of rhetoric when addressing the jury. His bold plunge into the medical jurisprudence and his emerging out with theories to create opinion in favour of the great improbability regarding the application of liquid chloroform by the prisoner to her husband strikes us not only as remarkable but as an instance of the all-comprehensiveness of the lawyer's intellect. We believe, that receptive minds, which are eager to achieve fame as criminal lawyers, will derive much benefit from such books. Hence our pleasure, at the addition of one more book to the widely known Trials Series.—K. C.

"SOAP BUBBLES," by S. V. V. Printed by Huxley Press, Madras. Price Re. 1.

This tiny volume contains a few humourous sketches by Mr. S. V. V., who may be quite familiar to the readers of "The Hindu". We begin with 'An Elephant's creed in Court' and pass on to 'An experience and prescription' of a railway passenger. We are amused at the discomforts of one 'In search of a son-in-law' and feel happy in the recollection 'when I was twenty'. We linger 'in the Mofussil Law Court' only to skip on to a discourse on the 'Vanity in a Railway Train'. We enjoy 'The wandering gipsy' with his sweet prophesies and strange requests, 'The country cousin abroad' becoming alive to the feverishness of city life, and the 'worry over the slippers' so common in every-day life, though we finally end with misgivings of the modern vogue of female education in 'My wife' and 'My daughter Visalam'. The subjects are treated nicely, though we hesitate to own that they have been wrought too skilfully to betray any conscious attempt at humour. But the book, as it is, may not fall short of the expectations. These 'Bubbles' by their translucency, may please the fancy of many a mind, eager to be diverted by moments of thoughtless pleasure.—K. C.

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LAW REPORTING*

Scotch, Irish and Colonial Reports.

It is not until 1537 when the Court of Session (as the Supreme Civil Court in Scotland is called) was established that settled forms of procedure can be said to have been established or judicial decisions treated as binding precedents in that country. The Court of Session consists of 13 Judges acting in an inner and outer house. The inner has two divisions with four Judges each, the first being presided over by the Lord President of the whole court and the second by Lord Justice Clerk. The history of this office bears remarkable resemblance to that of the Master of the Rolls in England. In the outer house, five Judges called Lords Ordinary sit in separate courts. Appeals may be made from the Lords Ordinary to either of the divisions of the inner house and if the occasion demands the opinion of all the Judges may be taken. From the Court of Session appeals lie to the House of Lords. Morison's Dictionary of decisions and Brown's synopsis of decisions contain abstracts of decisions from 1540, but regular reports date only from 1621†.

Court of Session cases date from 1821. The first series, known as Shaw and Dunlop, covers the period from 1821 to 1838; the second, Dunlop, Bell and Murray, from 1838-1862,

*The thirteenth of a series of lectures arranged by the University of Madras delivered by Mr. B. Sitarama Rao, Vakil, High Court.

† Durie's reports (1621-1642), Gilmour and Falconer (1661-1666), Gilmour and Falconer (1681-1686), Stair (1661-1681), Dirleton (1665-1677), Fountainhall (1678-1712), Harcarse (1681-1691), Dalrymple (1698-1718), Forbes (1705-1713), Bruce (1714-1715), Kames (remarkable) (1716-1752), Kames (select) (1752-1768), Edgar (1724-1725), Clark Home (1735-1744), Kilkerran (1738-1752), Falconer (1744-1751), Hailes (1766-1791), Bell (1790-1792), Bell (1793-1795), Hume (1781-1822), Faculty of Advocates (1752-1841).

the third known as Macpherson from 1862 to 1873, the fourth known as Rettie from 1873 to 1895. Fraser's Reports cover the period from 1898 to 1906. Since 1906, a new series commences, the citation for which is 1906 S. C., and so forth. The Court of Justiciary was instituted in 1672. It is the highest criminal court. The Lord Justice General (Lord President), Lord Justice Clerk and five other Judges form the High Court of Justiciary. There is no appeal from the Court of Justiciary to the House of Lords : *Mackintosh* v. *The Lord Advocate* (1). The reports of the justiciary cases are Shaw and Dunlop (1819-1831), Syme (1826-1830), Swinton (1835 1841), Broun (1842-1845), Arkely (1846-1848), Shaw (1848-1852), Stuart, Milne and Peddie (1851-1853), Irvine (1852-1868), Couper (1868-1885), White (1886-1893), Adam (1903-1906). Since 1906 Court of Justiciary Cases are reported along with Court of Session Cases and the citation is (1906) S. C. J., and so forth.

Scottish Law Reporter from 1865 up to date and Scots Law Times from 1893 up to date report all the courts without distinction.

The Scotch cases decided in the House of Lords from the time of the Union will be found reported in Robertson (1707 to 1727), Craigie, Stewart and Paton (1726-1821), Shaw (1821-1824), Wilson and Shaw (1825 to 1835), Shaw and Mclean (1835-1838), Maclean and Robinson (1839), Robinson (1840 to 1841), Bell (1842 to 1850), Macqueen (1851 to 1865), Paterson (1851 to 1873). The Scotch and Divorce cases cover the period from 1866 to 1875. The decisions of the subsequent period will be found reported in the Appeal Cases.

Though to start with, the Scotch Law was substantially the same as the English, the late establishment of centralised courts and the influence of France made the two systems depart considerably, the law of Soctland being largely modelled on the Digest and the Law of France. Such was the state of affairs at the time of the union in 1707, but since then the law in the two countries has been assimilated on many points. The criminal law of the two countries is now almost identical though the procedure differs in many respects. As regards the civil law the same Bill of Exchange Act governs both the countries. Similarly with the Workman's Compensation and the Sale of Goods Acts. The maritime law also is substantially the same. Similarly the law of torts and the law as to streams and

1. (1876) L R 2 A C 41.

waters. Still there are many points of difference. The theory of the Scotch criminal law is that the Supreme Criminal Court has power completely to punish (with the exception of life and limb) every act which is obviously of a criminal nature though it be such which in time past has never been the subject of prosecution. This view is not generally accepted in England though there is a decision which sounds in the same sense. There is no classification in Scotch criminal law of crimes into felonies and misdemeanours as in the English. The Scotch Law does not know the distinction between Equity and Common Law. Consideration is not necessary to support a contract, and mistake of law invalidates contracts. There is no distinction between contracts under seal and simple contracts; the distinction is between oral and written, and a written contract can be superseded only by another contract in writing. There is no statute corresponding to the Statute of Frauds in Scotland. Partnership is a distinct entity under that law. Trespass is not actionable without malice or substantial damage. There is no absolute power of disposition generally by will to the prejudice of wife and children. Actions by Lord Advocate or by relation to protect charities is unknown in Scotland and, as a result, suit by private individuals is recognised for the purpose : *Dundee Harbour Trustees* v. *D & Y Nicol* (2). The Scotch pleadings had never the subtlety and over-refinement they had in England. Some of the Scotch terms to which we have been in recent times familiarised by Scotch Judges in the Privy Council may be noted: a statement of claim annexed to the summons is condescendence, the plaintiff is pursuer, the defendant defender. Decree is the judgment of the court. Interlocutor is also used meaning a judgment. Condemnatur is a decree in favour of the pursuer, absolvitor in favour of the defendant. A mere dismissal does not operate as *res judicata*. A decree *in foro* is one pronounced after the defender has " compeared and pronounced his defences" and a decree in absence is one passed against one who had not appeared at all. By the Court of Session Act, 1868, 31 and 32 Vic., a decree in absence has the same effect as a decree *in foro* after the period assigned has expired. Multiplipounding is in familiar English interpleader; arrestment is garnishee proceedings; accretion in addition to its ordinary meaning is also used to denote the rule title feeds estoppel. Inhibition is attachment. Interdict is injunction. Rei Interventes is the

2. L R (1915) A C 568.

doctrine of part performance, and Homologation is conduct by which a man is estopped from denying the legal validity of an imperfect document. The obligation of a surety is caution. Conquest and singular succession correspond to purchase and inheritance of English Law. Approbate and Reprobate is the Scotch counterpart of the doctrine of election which has been held applicable by the Privy Council to India as a principle of universal jurisprudence. The doctrine of laches appears as Mora. Unlike the English Law, the Scotch Law compels a person to indemnify the relations of a deceased person for whose death he is criminally responsible. This is known as assythement. The rule as to liability for maintenance of relations is known as aliment. The Scotch Law imposes the legal obligation on father, failing him, mother, failing her, grandfather, of maintaining infant children and also recognises the liability of sons to maintain their indigent parents. In the case of illegitimate children, father and mother are equally liable. The Scotch Law also recognises a species of trust known as alimentary trust for the benefit of persons other than the settlor which is not assignable nor attachable by creditors. On points of general jurisprudence, construction of statutes and on all points where the English Law and the Scotch Law are identical, Scotch precedents may be of value to us here but there has hardly been an instance in which Scotch decisions other than those of the House of Lords have been cited in India. Many valuable decisions on general law are to be found in Scotch appeals and are cited in India.

Irish Reports stand on a different footing, as, both in point of substance and terminology, the Irish Law does not differ substantially from the English Law. The Common Law was introduced into Ireland early in the reign of John and Courts of Justice were set up in conformity with laws of England. We have the same distinction between Equity Courts and Common Law Courts and the same distinction between Common Pleas, Kings Bench and Exchequer. The Judges also were called by the same names. We had the Chancellors, Vice-Chancellors, Masters of the Rolls, Barons, Chief Barons and Lord Chief Justices. The Supreme Court of Judicature Act of 1877 established in their stead one Supreme Court of Judicature consisting of all the superior courts of law and the Equity Court, Court of Probate, Court of Matrimonial Causes, Land Estates Court and the High Court of Admiralty. The Land Estates Court is a peculiar feature of Ireland arising from the system of state loan and compulsory sale of holdings to tenants in occupancy

instituted by the various Land Acts. The Supreme Court was as in England divided into a Court of Appeal and the High Court of Justice. The High Court of Justice originally consisted of five divisions: Chancery, Queen's Bench, Common Pleas, Exchequer Chancery, Probate and Matrimonial. By the Judicature Act of 1897, Exchequer was amalgamated with the Queen's Bench and by the same Act, Probate, Admiralty, Bankruptcy, Matrimonial and Admiralty were administered as part of the Queen's Bench. The Chancery Division consisted of the Lord Chancellor, the Master of the Rolls, the Vice-Chancellor and the Land Judge. The matters assigned to the various divisions followed English lines and the rules of practice also have been assimilated as far as possible. The Court of Appeal consisted of certain *ex officio* Judges—two ordinary Judges, Lord Justices of Appeal and Additional Judges who have held certain judicial offices and consented to act. The Lord Chancellor was the President of the Court of Appeal. The jurisdiction of the Crown cases reserved was vested in Judges of the High Court or any five of them of whom the Chief Justice must be one. No appeal lay in a criminal matter save for an error of law apparent on the face of the record. From the decision of the Court of Appeal the appeal lay to the House of Lords. Before the union there was a great deal of controversy whether the appeal from the Courts in Ireland lay to the Irish House of Lords or also to the English House of Lords which was settled only in 1772 in favour of Ireland. But Since 1800, the date of the union of Ireland with England, the appeals lay to the House of Lords in England. The Government of Ireland Act, 1920, introduced a supreme Court for each of the two parts of Ireland and a High Court of Appeal for the whole of Ireland. This was subsequently modified by the Irish Free State Act and the North Ireland Act. For the former the Supreme Court was established with no appeal by right, but not barring appeal by special leave to the Privy Council. For the latter the Supreme Court was retained with appeal to the House of Lords as previously. The Supreme Courts in both the parts of Ireland consist of a court of Appeal and an original Court. Both the offices of Lord Chancellor and Master of the Rolls are abolished. The main points of difference between the Irish and the English Law are the following:— The Judgment Mortgage Act while abolishing the writs of eligit and all other modes of execution except *fi fa* introduced a system of registration of judgments which give the creditor a mortgage on the lands specified of the judgment-debtor for the amount of

the judgment. (2) The land purchase system already referred to. (3) The law of landlord and tenant is based on contract and not on tenures as in England. A reversion is not necessary to support the relation of landlord and tenant. Perpetually renewable leases for life were also a feature. An Act of 1850 provided for their conversion into freeholds subject to payment of a fixed rent. (4) The Law of Matrimonial causes stands as it did in England before the Act of 1857, that is to say, divorce can be had only by a bill. (5) There is a system of public registration in Ireland though voluntary. Registration gives priority over prior unregistered transfers if without notice. Registration itself does not amount to notice. The Irish Common Law Procedure Act has modified the law of limitation in Ireland. Its provisions correspond in the main to those of the English Act.

The history of Reporting also is similar to that in England. Reporting was and has continued private. In 1867 an incorporated Council of Law Reporting was established for the purpose of reporting, but other reporting still continues. The only reports prior to the Union are Ridgeway's Appeals and Writs of Error (1784 to 1796), and Wallis's Chancery Reports (1766 to 1791), Vernon and Scriven's Kings Bench (1786 to 1788), Ridgeway, Lapp and Schoales (1793 to 1795), of the same court. The Chancery Reports after the Union are Schoales and Lefroy (1802 to 1806), Ball and Beatty (1807 to 1814), Beatty (1813 to 1830), Molley (1827 to 1831), Lloyd and Goold (1834 to 1839), Drury and Walsh (1837 to 1840), Connor and Lawson (1841 to 1843), Lloyd and Goold (1835), Drury and Warren (1841 to 1843), Drury (1843 to 1844), Jones and Latouche (1844 to 1846) and Drury (1858 to 1859). Of these the reports Lloyd and Goold, Drury and Warren, Drury, Jones and Latouche and Connor and Lawson are specially valuable as they report judgments of Lord St. Leonards when he was Irish Chancellor. It is the opinion of Jessel that Drury and Warren reported cases better than Connor and Lawson. Hogan (1816 to 1834), Sausse and Scully (1837 to 1840), Flanagan and Kelly (1840-1842) report the Rolls Court. Smythe (1839 to 1840) is the only separate report of the Common Pleas.

The King's Bench Reports for the same period are Fox and Smith (1822 to 1824), Smith and Batty (1824 to 1825), Batty (1825 to 1826), Hudson and Brooke (1827 to 1831), Alcock and Napier (1831 to 1833), Cooke and Alcock (1833 to 1834),

Jebb and Symes (1838 to 1841), Jebb and Bourke (1841 to 1842). The Exchequer Reports are Hayes (1830 to 1832), Hayes and Jones (1832 to 1834), Jones (1834 to 1838), Jones and Carey (1838-1839), Longfield and Townsend (1841-1842). In 1838 began two series which reported all the superior courts called Irish Law Reports and Irish Equity Reports which continued up to 1850. They were followed by another series called Irish Common Law Reports and Irish Chancery Reports up to 1866. In 1867 the Council of Law Reporting came into being and started the series Irish Reports, Common Law series, and Irish Reports, Equity series, which continued up to 1877. In 1878 a new series began called Irish Law Reports which continued up to 1893. The present series date from 1894 and the citation now is (1894) 1 Irish and II Irish and so forth. Other journals that did the same sort of work are Law Recorder (1827-1831), another series (1833-1838), Glass Well (1831-1837), Irish Jurist (1849 to 1855), and a New Series (1855 to 1866). Irish Law Times began in 1867 and is continuing up to date. Irish decisions are not *per se* authority, *i. e.*, an English Judge is not bound to follow an Irish decision if he does not agree with it, but the Irish decisions are heard with respect and the more so where the Judges that have decided the case are men of learning: *H. C. Smith, Ltd.* v. *G. W. R. Co.* (3). The Irish Law being more approximately like the English than any other, the Irish decisions are naturally of more value to people governed by that system than any other.

Having done with Scotch and Irish Reports we may next pass to the Colonial Reports. I have told you that the law report is a pecular feature to the British system and you find it illustrated in a wonderful way in the colonies and dependencies. Wherever there is a British colony or dependency of any importance there you find a High Court or a Supreme Court modelled on the English Courts and a law report. Every colony and every state, however small, has its High Court or Supreme Court and, except rarely, has also its law report.

In Australia, the judicial power of the Commonwealth of Australia is vested in the Federal Supreme Court known as the High Court of Australia and in such other courts as the Parliament direct. The High Court consists of a Chief Justice and four puisne Judges. It is modelled on the Supreme Court of United

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3. L R (1922) 1 A C 186.

States and has original jurisdiction (*i*) in all matters arising under a treaty, (*ii*) in all suits where the Commonwealth is a party, (*iii*) or between two states or a state and the resident of another state.

Its appellate jurisdiction extends to hearing appeals from (*i*) the judgment of any Judge of the Court, or (*ii*) of any federal Court or of the Supreme Court of any state from which appeal lay to the King previously or (*iii*) from the interstate commission as to points of law. The laws of each state bind federal courts exercising federal jurisdiction within that state. The judgments of this court are reported by the Commonwealth Law Reports, Australian Law Times and Australian Jurist.

New South Wales has a Supreme Court from which appeals lie to the Privy Council in matters other than federal. The law administered is the law in force in England in 1828 and statutes subsequently passed by the state.

Queensland separated from New South Wales and the law of the latter colony till the date of separation as subsequently modified by the state legislature governs. It has also a Supreme Court. The procedure of the Court is modelled on the Judicature Acts, unlike the New Wales' Court which is modelled on the Common Law Procedure Act. The law governing in South Australia is the Common Law of England as it obtained on the day on which the colony was proclaimed to be a British Province so far as it is applicable to the circumstances of the colony. It has also a Supreme Court with a procedure similar to that under the Judicature Act.

The Law of Victoria is the law of New South Wales on 1851, and as subsequently modified by the state legislature. The Supreme Court of this state is planned on the Judicature Act.

The law in Tasmania is the law of England as in 1828. It has a Supreme Court. In 1903, the principles of the Judicature Act were introduced into this colony.

The law of Western Australia is the Common Law of England as in 1829. The Supreme Court of this state proceeds on the lines of the Judicature Act.

In Fiji Islands the law in force is English law as in 1875 to the extent suitable to the circumstances of the colony. The court of these Islands also is called Supreme Court.

The reporting in New South Wales seems to be private. For 1872 to 1876, you have the Supreme Court reports, for 1876-1878 a new series of the same name; for 1880 to 1900

the New South Wales Law Reports, and from 1901 onwards the New South Wales State Reports.

In Queensland private reporting continued till 1908, and the reports are Supreme Courts Reports (1860-1881), Law Reports (Beor) (1876-1878), Law Journal (1879-1901), State Reports (1902-1907). Since 1908 there has been a Council of Law Reporting which looks after reporting and publishes the Queensland State Reports.

In Victoria also, reporting was private till 1875, under the name Victoria Law Reports (1870-1874). Since 1875, reporting is done by the Council of Law Reporting and the Reports bear the name of Victoria Reports.

Both Western Australia Law Reports, which is the earlier series, and Commonwealth Law Reports from 1903 seem to be under private control. In South Australia also, the same seems to be the fact—both South Australia Law Reports (1867-1883) and the State Reports (1884 up to date) being under private management.

Fiji Islands :—Fiji Islands have their own reports as well as their Supreme Court.

New Zealand :—New Zealand law is the English law as it was in 1840. The Court is called Supreme Court and is governed by the English practice. In 1903, right of appeal to the Privy Council was taken away. The effect of this Act on the right of appeal in previously instituted suits was considered in *Colonial Sugar Refining Company* v. *Irving* (4). New Zealand seems to be blessed with a number of reports, the latest and apparently the most authoritative being the New Zealand Law Reports under the superintendence of a Council of Law Reporting.

South Africa.—By the South Africa Act, 1909, a Supreme Court of South Africa was established consisting of a Chief Justice, the ordinary Judges of appeal and the other Judges of the several divisions of the Supreme Court of South Africa in the Provinces. By that Act, the several Supreme Courts of the Cape of Good Hope, Natal and the Transval and the High Court of the Orange River Colony were converted into so many provincial divisions of the Supreme Court, each with a President. Appeal from the provincial divisions is to the appellate division. No appeal lies to the King in Council, but the Judicial Committee may give special leave. The South African

4. L R (1905) A C 369.

Legislature may curtail even this right, but the legislation so made is subject to His Majesty's pleasure. The law in force in the various states are as follows: In the Cape of Good Hope, Roman Dutch Law as at the time of the second occupation by the British and later statutory changes and local customs govern. The procedure has been modified on English lines and Shipping and Maritine Law also has been introduced.

In Natal also the Roman Dutch Law prevails, but, so far as natives are concerned, they are governed by their own customs, provided they are not opposed to natural equity.

In Transval the law governing is the Roman Dutch Law and the general customs of South Africa.

Roman Dutch Law prevails also in the Orange River Colony.

All these have their reports. You have the South African Law Reports, Appellate Division and you have the Law Reports for the various provincial divisions. Reports are most plentiful in the State of Cape of Good Hope. They are: Menzies Reports of the Cape of Good Hope (1828 to 1850), Buchanan's Reports of the Supreme Court of Cape of Good Hope (1868 to 1879). Buchanan's Reports of the Appeal Court deal with the period before the South Africa Act. In addition you have Cape Law Journal and Cape Law Reports.

The High Court of South African Republic has Hetzgog's Reports, 1893, and Official Reports of the South African Republic.

For Transval you have Kotye's Reports of the High Court of Transval. Rhodesia has its Reports of the High Court of Rhodesia. Griqualand West has a High Court and also its reports styled the High Court of Griqualand Reports. You have the Reports of the Orange River Colony and of Orange Free State.

The Supreme Court of Canada was established by 38 Vic., c. 11, British North American Act, 1867. It consists of a Chief Justice and five puisne Judges. Appeals lie to it from the Supreme Courts of the various states on some matters and there is no further appeal to the Privy Council except by special leave of that tribunal. There is a Court of Exchequer having exclusive jurisdiction in cases where relief is sought against the Crown and concurrent jurisdiction in cases in which the Crown is the plaintiff or in matters relating to the revenue of the Crown, or where a Crown Officer is defendant and the action is in

respect of his official acts and in patent cases brought at the instance of the Attorney-General. Appeals from its judgments lie to the Supreme Court of Canada.

The Province of Alberta has a Supreme Court presided over by a single Judge. Appeal lies to the Privy Council where the value of the subject-matter exceeds £300.

British Columbia has also its Supreme Court with a Chief Justice and four puisnes. Appeal lies to the Privy Council direct in cases above £300 or to the Supreme Court of Canada and thence by special leave. The law is the English Law as in 1858 so far as it is not excluded by reason of the special circumstances and conditions of the colony.

The law of Manitoba is English Law as it was in 1870. The Court consists of a Court of Appeal with a Chief Justice and three Judges who are also *ex-officio* Judges of the King's Bench. Appeal lies from the Court of Appeal to the Privy Council when the value is above £300 or to the Supreme Court of Canada and thence to the Privy Coucil by special leave.

New Brunswick.—Supreme Court consists of Court of Appeal and a Trial division with a Chief Justice and five Judges. Proceedings in Equity are heard by one of the Judges of the Court of Appeal known as the Equity Judge. Appeal lies to the Privy Council in cases above £300 or where crown rights are involved.

In Nova Scotia the whole of English Common Law, unless wholly unsuitable, applies. It has a Supreme Court; with a Chief Justice, a Judge in Equity and five puisne Judges.

Ontario previously called Upper Canada has a Supreme Court with a High Court of Justice and a Court of Appeal. The High Court has three divisions, Common Pleas, Chancery and Exchequer, each with a Chief Justice. The Court of Appeal has also its Chief Justice and four Judges. The decision of a Divisional Court of Appeal binds the Court of Appeal and all its divisions. The decision of a co-ordinate authority is binding, but the Judge may refer the question to the Appellate Court. An appeal lies to the Privy Council direct in cases over 4,000 dollars, or to the Supreme Court of Canada to which an appeal lies in all matters where title to realty is involved or a question as to patents is involved and where the value exceeds 1,000 dollars. The law is the English Law as at the year 1792.

Quebec previously called Upper Canada is governed by French Law which was codified in 1866.

Newfoudland is the oldest British colony. The Statute Law of England up to 1833 and the common law govern. It has its Supreme Court with a Chief Justice and two Judges.

The Supreme Court Reports and Exchequer Reports in Canada are published by the Government of Canada. You have also private Reports like Canada Law Times and Canadian Law Journal.

In New Brunswick, the reporting is private. In Nova Scotia, the Bar Society now publishes the Reports. The earlier Reports were by private agencies—Oldmights, Russel and Chasley and Russel and Geloest. Similarly the respective Law Socities publish Alberta Reports, British Columbia Law Reports, Manitoba Law Reports and Ontario Law Reports. In Quebec, the Bar Society publishes its reports now called Quebec Reports. Prior to these, there were various private publications. Staurt's Lower Canada Reports K. B. (1810 to 1834), Lower Canada Reports (1851 to 1861), Lower Canada Jurist (1857 to 1881),Legal News (1878 to 1887), Law Journal (1866 to 1868) and Sykes Lower Canada Reports. In addition you have certain French Law Reports like La Revenue Juridique. In Ontario also previously there were private publications like upper Canada Queen's Bench series, Common Pleas, and Chancery Chambers Reports. Newfoundland has its Newfoundland Reports and Prince Edward Island, Prince Edward Island Reports.

Gibralter has its Supreme Court and administers English Law. Malta has its own Court and administers Roman Law. Information is not available as to whether these have their reports. Ceylon has its Supreme Court and an appeal lies to the Privy Council from final judgments over 5,000 Rupees in value. The Law administered is Dutch Law modified by local enactments, some of which have introduced specific portions of English Law, and by judicial decisions following English Rules of Law and Equity, Desavalame or customs of the Tamil inhabitants, laws and usages of Mussulmans and the Vandyam Law. There is a Penal Code, Civil Procedure and Evidence Act, based on Indian models.

In Hongkong also, there is a Supreme Court with a Chief Justice and puisnes with appeals to the Privy Council from judgments over £500 in value and administering the common law of England, as it existed in 1843, and statute law. The Civil Procedure is based partly on Indian model and partly English.

The Strait Settlements also have their Supreme Court. They administer the common law as it stood in 1825 and various Statutes and Ordinanees and special laws such as Hindu Law, Muhammadan Law and Christian Law. The mercantile law is generally English Law. Some of the Indian Acts have been either made directly applicable or have been substantially adopted.

The East African Protectorate and Uganda also have each their High Court and have paid India the compliment of adopting the Indian Civil Procedure, Criminal Procedure and the Penal Code. In British North Borneo also, the Indian Penal Code and Civil and Criminal Procedure Codes have been adopted.

Canadian editions of English Text-books have familiarised Indian Lawyers to some decisions of Canadian and Australian Courts. The Empire Digest of Butterworth may help the citation of cases from other parts of the British Empire where local authority is not available and the point is novel. But it is never likely that the reports of these courts will be largely cited or relied upon in Indian Courts, even if the intrinsic authority of the judgments should be much greater than they are at present. Unfamiliarity with the peculiar conditions of each place will contribute its share and political prejudice will do the rest. There is larger likelihood of reference to American authorities both by reason of their intrinsic authority and by reason of the absence of any political prejudice against that country. But judgments of the Privy Council delivered in cases coming from these countries are used as authority both in Indian and English Law Courts and that way, the growth of law is influenced by them. Cases from Africa and Canada have been used in India for the elucidation of the law applicable to religious societies. Decisions of the Privy Council from different parts of the British Empire as to the elements necessary to constitute malicious prosecution are quoted in India as authority. A decision in a case from Australia as to possessory title has effectively ruled out many Indian decisions on the subject. A British Columbia case and a Gibralter case on the question as to time being of the essence is authoritative as much in those places as in India. *Corea* v. *Appuhamy* (5) and *Agency Company* v. *Short* (6), two leading authorities on the law of adverse possession, are colonial cases. The former is a Ceylon case and the latter a New South Wales case.

5. L R (1912) A C 230. 6. (1888) L R 13 A C 793.

The decision in *Meyyappa Chetty* v. *Subramanian Chetty* (7) on Strait Settlement Liimtation Ordinance, in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (8) on Evidence Act, in *Will* v. *United Lankat Plantations Co., Ltd.* (9) on Ceylon Civil Procedure Ordinance are naturally taken as authorities on the questions decided in India also. In *Kumber* v. *The British India Steam Navigation Co., Ltd.* (10) it has been ruled that the decisions of the Privy Council are binding authority in India from whichever part of the world the case might come provided, of course, the law administered is the same. The Privy Council case relied upon in that case came from Strait Settlements. The use of the colonial cases is not all on our side alone. You find the Privy Council recently citing a decision in a case from Bombay, in a Jamaica case in *Wardy* v. *Brown* (11). *Sirdhar Dayal Singh* v. *Raja of Faridkote* (12) is a leading authority on private international law. Lord Brougham's judgment in *Mayor of Lyons case* (13) and Lord Stowell's judgment in *Re Indian Chief* (14) are leading authorities on the question as to the extent to which English law is applicable to foreign settlements. The judgment of Justice Wilson as to copyright in a Calcutta case was cited with approval recently in an English case.

SUMMARY OF ENGLISH CASES.

REX *v.* WOOD, (1928) 1 K. B. 302.

Practice—Coroner present in the retiring room with Jury—Inquest.

Where a coroner was present with a Jury in their retiring room while they were considering their verdict,

Held, that it was a fatal irregularity and misconduct and the inquisition must be quashed.

MONKS *v.* FOX'S EXECUTORS, (1928) 1 K. B. 351.

Income-tax—Victory bonds—Tender in payment of—Estate duty to the Crown—Value—Addition of accrued interest

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7. L R (1916) 1 A C 603. 8. L R (1916) 2 A C 575.
9. L R (1914) A C 19. 10. (1913) I L R 38 M 941 : 25 M L J 162.
11. L R (1916) 2 A C 121.
12. (1894) L R 21 I A 171 : L R 1894 A C 670 : 4 M L J 267 (P C).
13. (1836) 1 M I A 175. 14. (1800) 3 Ch. Rob. 26.

till the date of transfer—Whether accrued interest is assessable—Finance Act, 1917 (7 *and* 8 *Geo V, c.* 31), *S.* 34—*Finance Act,* 1918 (8 *and* 9 *Geo. V, c.* 15), *S.* 42.

Under S. 34 of the Finance Act, 1917, as amended by S. 42 of the Finance Act, 1918, and under the terms of the prospectus relating to the issue of 4 per cent. Victory bonds, the Victory bonds were tendered by the assessee to the Commissioners of Inland Revenue in payment of Estate duty and the latter accepted the same at the face value of the bonds with the addition of the interest accrued but remaining unpaid at the date of transfer.

Held, that the accrued interest up to the date of transfer which was taken into account in the valuation of bonds was part of the value of the bonds and not interest and therefore that it was not subject to income-tax.

FIRST GARDEN CITY, LIMITED *v.* BONHAMCARTER, (1928) 1 Ch. 53.

Company—Cumulative preference shares and ordinary shares—Provision for payment of cumulative dividend—Provision for payment of balance of profits to a city—Mode of distribution of profits.

A Garden City Company, Ltd., was incorporated under the Company's Act for the purpose of forming a garden city. Its capital was divided into cumulative preference shares and ordinary shares. The Memorandum of Association of the company contained a clause to the effect that a cumulative dividend not exceeding 5 per cent. per annum should be paid on the ordinary shares of the company and that the balance of profits should be applied to the benefit of a garden city or of its inhabitants. The Company's Articles of Association provided that, subject to the rights of holders of debentures and preference shares, the net profits of the company after providing for a reserve fund and depreciation should be divided by way of dividend among the members in proportion to the amount paid on the ordinary shares held by them respectively, but so that the dividend upon the ordinary shares for any year shall not exceed the aggregate rate of 5 per cent. per annum, and that the surplus of the net profits of the company after payment of such dividends and the amount necessary to make up dividends for the past years to the rate of 5 per cent per annum shall be applied for the benefit of the

city or its inhabitants. The company issued a number of ordinary shares during several years but no dividend was paid for a period of 20 years till 1923 when a full dividend of 5 per cent. was paid.

Held, that the profits which were available for the payment of arrears of dividend but which were not sufficient to pay the whole of the arrears must be distributed rateably among the shareholders in proportion to the respective amounts of arrears of dividend payable on the shares held by them respectively.

ALBEMARLE SUPPLY CO. *v.* HIND & CO., (1928) 97 L. J. K. B. 25.

Contract—Hire purchase agreement—Provision that the hirer should not have any lien on the taxicabs hired for any moneys due for repairs to them—Bailment of the taxicabs by the hirer—Account for supply of oil, petrol and other repairs—Lien by bailee for cost of repairs.

The plaintiff company, owners of taxicabs, let three taxicabs to one Botfield, under three separate hire purchase agreements. The agreements contained clauses to the effect that the hirer could not create any lien upon the taxicabs for moneys due in respect of any repairs done to them. The hirer kept these three taxicabs and two other cabs belonging to him at the defendants' garage. The defendants looked after them, cleaned them, supplied tyres, oil, etc., and did all necessary repairs and charged rent for them. Botfield got into arrear with his payments under the hire purchase agreements and thereupon the plaintiffs gave notice to the hirer to determine the hire-purchase agreements and required the cars to be delivered to them. In an action by the plaintiffs for delivery of the cabs, the defendants who had no notice of the agreement, claimed a lien on the taxicabs for the balance due to them, part of which only went towards the repair of the three cabs hired from the company.

Held that the defendants were not precluded from claiming a lien because of the clauses in the agreement and the right of lien was not lost by their claiming a lien for a larger amount than was due to them, as the plaintiffs had not tendered to the defendants the amount due, or any other sum, but disputed the claim of lien altogether and so the defendants were entitled to refuse delivery of the cabs.

VOSPER *v.* GREAT WESTERN RAILWAY, (1928) 97 L. J. K. B. 51.

Common Carrier—Passenger entrusting his suit-case to the porter of a railway company—Loss—Liability of the Railway Company—Negligence.

Where a passenger entrusted his suit-case to the porter employed by the company and gave directions to place it in a first class compartment but the passenger having a third class ticket travelled both in the third class compartment and in the restaurant car and the suit-case was lost and the passenger brought a suit for damages against the Railway Company,

Held, that the Railway Company was liable for the loss of the suit-case because the loss was not occasioned by the negligence of the passenger.

In such cases the liability of the Railway Company as common carrier is modified by an implied condition that the passenger should take reasonable care and the loss should not occur on account of the negligence of the passenger.

WISBECH RURAL COUNCIL *v.* WARD, (1928) 97 L. J. K. B. 56.

Contract—Building Contract—Architect under—A mere agent for the owner or quasi-arbitrator—*Granting of Interim Certificates—Negligence—Liability for damages.*

An architect under a building contract may occupy two positions: (*a*) he may be merely an agent of the building owner; or (*b*) he may be placed in the position of an arbitrator or *quasi-arbitrator*. If he is merely acting as an agent for the building owner he may be liable for negligence. If he is acting an an arbitrator or *quasi-arbitrator*, he is clothed with the duty of exercising an impartial judgment and he will not be liable for mere negligence. He will only be liable when he has been shown to be fraudulent.

Though in giving a final certificate the architect acts in a *quasi* judicial character, unless there is some express clause in the contract to contradict it, it cannot be said that in giving an interim certificate he is so acting. On the contrary, in giving an interim certificate he is merely acting as agent for the building owner unless there is something in the contract to contradict that relationship.

PATRICK *v.* RUSSO-BRITISH GRAIN EXPORT CO., (1928) 97 L. J. K. B. 60.

Contract—Sale of goods—Goods not delivered to the buyer—Buyer reselling the goods and the seller aware of it—Loss of profit—Damages—Measure of.

The seller sold to the buyers certain quantity of wheat of a particular description, but delivery was to be made at a particular date. The buyers who were merchants resold the same to another at a profit before the date of delivery and it was within the contemplation of the original seller that the buyers would resell the wheat. The seller failed to deliver on the due date. On and after the date of breach by the seller it was impossible for the buyers to obtain the same quantity of wheat of the contract description.

Held, that the buyers were entitled to recover their loss of profit on resale and that the difference between the contract price and resale price constituted the measure of damages.

TARN *v.* SCANLAN, (1928) A. C. 34.

Income-tax—Foreign Shipping Company—Contracts made and services performed in the United Kingdom in regard to the carriage of goods by an English Company—Liability of the resident as an agent—Income-tax Act, 1842, *S.* 41.

A Danish Shipping Company and an English Company established by agreement between themselves a regular line of steamers between Copenhagen and Hull. It was a term of the agreement that the English Company should be the exclusive agents for the Danish Company at Hull during the continuance of the agreement. The English Company controlled the freights at this end, quoted rates of freight to the consignors, arranged room on the steamers and employed stevedores to put the goods on board. The bills of lading were signed "for the master" by one of the English Company's clerks. Further, the English Company collected the freight for outward-bound goods and any other moneys due from the consignors, and remitted what was due to the Danish Company.

The questions that arose for decision were (1) whether the Danish Company exercised a trade within the United Kingdom so as to be chargeable under Schedule D of the Income-tax Acts with tax on the profits and gains of such trade, and (2) whether they were so chargeable in the name of the English Company: Rowlatt, J., and the Court of Appeal answered both the questions in the affirmative.

Held, (on appeal), that, applying the tests laid down in *Erichsen* v. *Last*, (1881) 8 Q. B. D. 414, the Danish Shipping Company did carry on in the United Kingdom trade to the extent to which goods were taken on board their ships at Hull for carriage elsewhere, and (2) that this trade was carried on by the British Company as their regular agents.

GREAT WESTERN RAILWAY COMPANY *v.* OWNERS OF S. S. MOSTYN, (1928) A. C. 57.

Shipping—Damage caused by a vessel to the Dock Works—No negligence on the part of the shipowner—Liability—Harbours, Docks and Piers Clauses Act, 1847 (10 *and* 11 *Vict., c.* 27), *S.* 74.

In an action for damage caused to the docks of the plaintiff by the defendant's vessel it was found that there was no negligence on the part of the defendant ship-owner.

Held, that, though the shipowner was not liable under the common law, by virtue of S. 74 of the Harbours, Docks and Piers Caluses Act, 1847, the owner of the vessel doing damage to a harbour, dock or pier or works connected therewith was responsible to the undertakers for the damage caused whether negligence was proved or not.

River Wear Commissioners v. *Adamosn,* (1877) 2 A. C. 743, explained and distinguished.

WATSON *v.* HAGGITT, (1928) A. C. 127.

Partnership—Construction of Deed—"Nett profits"—Meaning of.

According to clause 3 in a partnership deed each of the two partners was to be paid annual salary and the "nett profits" of the partnership business was to be divided between them. Another clause 21 provided that, if either partner should die, the surviving partner should pay to the representatives of the deceased partner for each of the succeeding five years a sum equivalent to one-third share of the nett annual profits.

Held, that the "nett annual profits" for the purpose of cl. 21 should be calculated without deducting the salary provided for the surviving partner.

There is no rule of general application that the same meaning ought to be given to an expression in every part of the document in which it appears. It is only to solve any difficulty or ambiguity that such a device is permissible and is resorted to.

JOTTINGS AND CUTTINGS.

Amendment of the Letters Patent of the Madras High Court by Order in Council, dated, 3rd November, 1927:—

(*a*) For the fifteenth caluse of the said Letters Patent the following clause shall be substituted, namely :—

15 "And we do further ordain that an appeal shall lie to the said High Court of Judicature at Madras from the judgment (not being a judgment passed in the exercise of appellate juricdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of S. 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to S. 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one judge of the said High Court or one Judge of any Division Court, pursuant to S. 108 of the Government of India Act, made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal ; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as herein provided : "

(*b*) In the 36th clause of the said Letters Patent for the words " then the opinion of the senior Judge shall prevail" the following words shall be substituted, namely :—

" They shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it".

2. And we do further ordain and declare that these Letters Patent shall be published in the *Fort St. George Gazette* and shall have effect from the date of such publication.

Forensic Speech—Now and Then.—It is no wonder that a judge hates to be addressed "as if he were a jury," the reason is obvious. On the other hand, it is notorious that most juries

would resent being addressed "as if they were a judge," and would probably fall asleep under such treatment. Between the two, the way of the advocate is hard; and few indeed are they who excel in both hemispheres. But there are a few. And it may be admitted that much higher gifts are required to convince and or to "wheedle" a judge than the most intelligent of juries—special or common.

One reason for the scarcity of that forensic eloquence which was so much admired in the Victorian age is undoubtedly the steep decline in the use of juries. The conversational, reasonable tone by which the attention and regard of judges is secured can never favour a "great speech" of the old kind; but it is slowly producing a much finer and better style, the end of which is clarity, brevity, and the right use of the illuminating phrase.—*L. J.*, 1928, p. 105.

The Judicial Changes.—The announcement, on Tuesday morning, that Lord Atkinson had retired, that Lord Justice Atkin had been appointed a Lord of Appeal in his place, and that Mr. Justice Sankey had been appointed to fill the Lord Justiceship so rendered vacant, whilst unexpected at the precise moment, occasioned no surprise. Lord Atkinson, who is eighty-three, had been a Lord of Appeal for twenty-two years—having been appointed direct from the Irish Bar in 1905, after having been a Law Officer in Ireland for sixteen continuous years—a position which must have been, during that period, a very difficult and anxious one. The position of Attorney-General or Solicitor-General in England is recognised as being no sinecure; but the Irish Law Officers at the close of the nineteenth century must indeed have had a difficult task; and to hold such an office from 1889 to 1905 attests at once Lord Atkinson's mental and physical vigour. He has earned, and received, the appreciative respect of the profession in this country, and carries into retirement its good wishes for the future.—*L. J.*, 1928, p. 107.

Lord Justice Atkin.—Lord Justice Atkin has long enjoyed the esteem and the admiration of all who have practised before him. Although he had a great reputation at the Bar, there was some surprise—though nothing but approval—when he was made a Judge of the King's Bench at the early age, nowadays, of forty-five. He quickly justified on the Bench the high expectations held by all who knew him, and he has added to his

reputation during his eight years in the Court of Appeal. His practice at the Bar was chiefly in the Commercial Court, but his interests have been by no means confined to that branch of the law. For some years he was President—and a very active President—of the Medico-Legal Society, a post which he only vacated last year. And he was, of course, the Chairman of the Committee which, after the Ronald True case, investigated the Macnaughten Rules, and presented a report which is still being argued about. Lord Justice Atkin was also, for several years, the President of the Council of Legal Education, and, as such, was intimately concerned with the training and testing of candidates for the Bar. His promotion to the highest Court of the Country is universally welcomed.—*L. J.*, 1928, p. 107.

Mr. Justice Sankey.—Mr. Justice Sankey, who becomes the new Lord Justice, is sixty-one, a year older than Lord Justice Atkin in age, and a year junior to him as a Judge; for Lord Justice Atkin became a Judge in 1913, and Mr. Justice Sankey in 1914. The sound commonsense, the ripe knowledge of law, and the courteous imperturbability of manner which distinguish Mr. Justice Sankey combined to make him very nearly an ideal Judge of first instance; there were never any scenes in his court, and the cases which came before him always seemed to be very easy to try. To most people he is associated with the Coal Industry Commission of 1919—the Sankey Commission. Whatever views one may hold as to the proper solution of the problems affecting the coal industry, and whether it is considered that the report of that Commission should have been accepted or not, it will be generally agreed that the duties of the Chairman were performed with remarkable ability. But the course of its proceedings, and the fact that its recommendations necessarily became the subject of heated controversy, made it plain that it is the height of unwisdom to appoint serving Judges to preside over inquiries raising acute political issues. It is unfair to the individual Judge, who finds himself cited as approving or disapproving a particular policy; and it tends to harm the prestige of the Bench as a whole. Mr. Justice Sankey's promotion to the Court of Appeal has been received with great pleasure by the profession.—*L. J.*, 1928, p. 107.

The New Judge.—It was announced on Wednesday that the vacancy in the King's Bench Division, occasioned by the promotion of Mr. Justice Sankey to the Court of Appeal, had

been filled by the appointment of Mr. John Anthony Hawke. Mr. Hawke, who is fifty-eight, was called by the Middle Temple in 1892, and took silk in 1913. He has long enjoyed a leading practice at the Common Law Bar, and, whilst jury cases have, perhaps, been his chief *metier,* he has established a reputation as a very sound lawyer, perhaps the most eloquent proof of this fact being that he has frequently been briefed to lead in the Chancery Division. Mr. Hawke, who held the appointments of Attorney-General to the Prince of Wales and Recorder of Plymouth, sat in the House of Commons for the St. Ives Division of Cornwall. He has enjoyed great popularity at the Bar, and his promotion to the Bench will be received with warm approval by the profession.—*L. J.* 1928, p. 108.

Counsel's Freedom of Speech.—Mention was made a short time ago herein of the limitations placed by the unwritten rules of professional conduct and etiquette on counsel's freedom of speech; and the case was cited in which Lord Campbell having once, as counsel, declared to a jury his personal belief in his client's innocence, found himself tongue-tied as a Judge when Sergeant Shee, relying on Campbell's indiscreet precedent, repeated the offence.

And, behold, here is history, which never exactly repeats itself, within measurable distance of a repetition in *Rex* v. *Rust.* Not once, said the Lord Chief Justice, but five times, did counsel remind the jury of the usual and terrible punishment for murder, quoting in aid words uttered by the L. C. J. himself—but on a very different occasion. Now it is wrong for counsel to do this sort of thing; for the jury are concerned with the verdict only, and not with the consequences. The jury know, without any reminding, that the punishment for murder is usually death; but Mr. Valetta rubbed it in. He achieved a notable success; and many old members of the Bar have declared that which he said amiss might have been said differently and unobjectionably.—*L. J.*, 1928, p. 131.

Observations to and concerning juries.—It is perhaps unseemly for a mere legal scribbler, behind the veil of anonymity, to express approval or dislike concerning the words and ways of judge or counsel engaged in the grave issues and events of a trial for murder. And to the Lord Chief Justice one renders a homage and respect due to one who is already regarded as one of the greatest—and most impartial—of all the judges who have adorned the Bench of England.

Yet must it be confessed that the Lord Chief's words to the prisoner, after his acquittal, sounded strangely in the ears of some members of the Bar. The "Not Guilty" of a jury is final and unanswerable. Should its recititude, even by the faintest of innuendoes, be impugned?

Admittedly, great judges have before now commented on the findings of juries. In a case of a very difficult character a judge—was it not Coleridge, C. J.?—thus addressed the prisoner: "I congratulate you on your almost miraculous escape from your thirty-seventh conviction for felony".—*L. J.*, 1928, p. 131.

The Releases of Branson, J.—The Honourable Mr. Justice Branson has many merits, and one of them it is my bounden duty to extol; resulting, as it does, in manifold blessings, comforts, savings of time and temper, and other good to members of the Bar, solicitors, juries, litigants, witnesses and other beneficiaries. I refer to his considerate practice, early in the judicial day, of releasing all those engaged in cases which appear on his day's list, but which, on the facts before him, cannot possibly be heard on that day. Other judges are not inconsiderate, of course; but Branson, J., excels in this. And there have been judges who have, without just cause, waited until three O'clock and later before pronouncing the time-saving order of release, when it might well have been delivered long before the luncheon adjournment.

It is told, moreover, that never once has judicial time been lost as a result of this judge's considerate practice. On the other hand, thousands of the working hours of the beneficiaries aforesaid have been saved for the country, whereby many have praised his name. —*L. J.*, 1928, p. 132.

Fraudulent Judgments.—To what extent can an English Court interfere by injunction to prevent the enforcement of a foreign judgment obtained by fraud? This was the question before the Court of Appeal recently in *Ellerman Lines, Ltd.* v. *Landi* (*Lloyd's List*, 1st inst., *post* p. 142), and they carried the injunction somewhat further than MacKinnon, J., had done (Lloyd's List, 21st October, 1927; 44 Times L. R. 7, *sub nom. Ellerman Lines, Ltd.* v. *Read and Others*). One of the plaintiffs' ships *The Falernian*, stranded in the Black Sea. Landi was a part-owner and the manager of a salvage steamer, and a contract was made with him to get the ship off. The contract was in a Lloyd's form and provided that the salvage remuneration

should, in default of agreement, be fixed by arbitration in London; that security for payment should be arranged in London; and that the salvor would not arrest the ship except in case of an attempt to remove her before security was given. Security was given and the ship was refloated and put in dry dock at Constantinople for temporary repairs. Thence she was to be taken to Marseilles, but Landi arrested her, and before the Turkish Court swore that security had not been given and claimed salvage remuneration. The Turkish Court gave judgement by default for some 24,000*l* in English money. The ship was sold for about 4,000*l.* and was finally lost to Ellerman Lines. Her value was said to be some 14,000*l.*—*L. J.*, 1928, p. 135.

A World-wide Injunction.—According to the judgment of MacKinnon, J., Landi obtained the Turkish judgment by swearing what he knew to be untrue—that security had not been given. The action here was brought for damages and for an injunction to restrain the enforcement of the Turkish judgment. There was the fear that Landi might seek to enforce it against other ships of the plaintiffs in Black Sea ports. But MacKinnon, J., held that he could not grant an injunction restraining generally the enforcement of the Turkish judgment. He made a declaration that it was not to be enforced as an English judgment, but while the English courts would refuse to enforce the judgment here, it was beyond the power of the English Courts to say that it should not be enforced anywhere in the world. The Court of Appeal have taken a stronger line. If, said Scrutton, L.J., there was no authority for such an injunction, it was time the Court made one. Landi is a naturalized British subject. No injunction could go, of course, against the Turkish Court, but an injunction could go against Landi to restrain him from applying to the Turkish Court to enforce his judgment in breach of his contract. This is a useful precedent and it carries the remedy as far as is possible. Whether, in fact, such an injunction will be effective is another matter.—*L. J.*, 1928, p. 135.

Making of a Master.—There was a time when a Mastership was as soft and pleasant as a bed of roses. The Master was supposed to be versed in the practices of the different Courts and he sat accordingly beneath the judge, ready and willing to inform him on abstruse points of procedure; but as the judge

usually knew quite as much as the Master, information was seldom required. When not in Court, the Master taxed a few bills of costs. But now he has to work hard for his living. It was in 1867 that the hard times began. In that year the Judges' Chambers Act was passed, and the Masters were enabled and commanded to exercise the jurisdiction of judges in chambers.

Since 1884 the appointment of Common Law Masters has lain in the Lord Chancellor, the Lord Chief Justice and the Master of the Rolls, by rotation. Formerly the Chief Justice of the King's Bench, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer each enjoyed the right to appoint in his own Court. How does the intending candidate apply for one of these desirable jobs? It is understood that letters of request, accompanied by recommendations from lawyers, clergymen and politicians, are addressed to the Lord Chief Justice and the Master of the Rolls. Barristers of less than five years' standing are not eligible.—*L. J.*, 1928, p. 153.

The Favoured Sex.—That woman continues, despite every attempt at sex equality, to enjoy peculiar legal favours and privileges is oft exemplified in the Probate, Divorce and Admiralty Division—to say nothing of the favours shown her in the Chancery Courts and in the Common Law tribunals, where the law of torts is referred to and applied.

In the President's Court this matter was recently exemplified in the case of *Butler* v. *Butler*. The husband was granted a decree *nisi* on the ground of the wife's adultery. He was a man of substantial means and the President declared that it was desirable that the question of her future maintenance, to which the husband agreed, should be determined. Whereupon he granted the decree, but declared that, before it was made absolute, he would hear what proposal the husband had to make in regard to the future maintenance of the respondent.

And whether the husband is willing or unwilling, the Court has an absolute discretion to make an order that he shall pay such sum for the future maintenance of the guilty wife as it shall deem reasonable. The rule is not obsolete or even antique. It is embodied in S. 1 of the Matrimonial Causes Act of 1907.

But suppose a similar case of rich wife and poor husband. Has the Court any discretion to order her to pay for his future maintenance? The answer is, and will continue to be, in the negative.—*L. J.*, 1928, p. 153.

BOOK REVIEWS.

CRIMINAL INVESTIGATION AND PROCEDURE by N. Kasturiranga Aiyangar, B. A., B. L., High Court Vakil, Madras. Printed and published by Messrs. P. R. Rama Aiyar & Co., Madras. Price Rs. 4-8-0.

We have great pleasure in acknowledging the receipt of the book from the pen of one who has practised before the Criminal Courts in the mofussil and in Madras. The object of the book is to state clearly the various stages of the investigation of crimes from the first information report to the stage of putting in a final charge sheet. The author has intended it mainly for the use of Police Officers and it is written with a view to enable them to have a thorough grasp of the rules of the Procedure, the non-observance of which has in many a case resulted in the acquittal of the accused although they may not be innocent. It can hardly be denied that the duties of the Police Officers are often so engrossing that they cannot devote much time to the study of the treatises of criminal law and procedure. The author has presented in less than 400 pages of this volume, the duties of the Police in the investigation of crimes and what they should avoid in the discharge of their duties under the law and in accordance to the decisions of Courts. The author has fully realised what a distinguished officer in the police service has said "that the success of an investigating officer depends not less on a good working knowledge of the law in the matter of evidence and procedure, than on any special intuitive skill in detection which is found more often in detective novels than in actual practice" and keeping that in view has dealt with the rules of criminal procedure and evidence in twelve chapters of the book under review. The Appendices A to F give the various Police enactments, Appendix G gives a few decisions of interest by the Madras High Court and Appendix H gives the rules of examination of witnesses by an eminent American Lawyer, Mr. Paul Brown. The book will be found useful not merely to the Police Officers but to lawyers practising before the Magistrates and to the Magistracy in general. We cannot conclude this review without drawing special attention to the printing and get up of the book which leave nothing to be desired.

AIDS TO HINDU AND MOHAMMEDAN LAWS by R. V. Apte, M.A., LL.B., Pleader, Poona. Price Rs. 2-8-0.

This book is intended for the use of students preparing for the law examinations. Though we are not in favour of students reading hand-books on the various subjects and acquiring no higher knowledge than is contained in them, even such books have their use after the students have gone through the prescribed treatises and acquired a fair acquaintance of the subjects dealt with. The object of the small books is to focus the attention of the student preparing for the examination and to gather the threads of his study of the treatises. A special feature of this book is the collection of the original Sanskrit texts on all the important topics of Hindu Law with their English translation. One other remarkable feature consists in the Sanskrit sutras on Mohammedan law composed by the author himself with an English translation of them. We have no doubt that this book will be appreciated by the students.

SUCCESSION CERTIFICATES AND CURATORS, by Dr. M. Krishnamachariar, M. A., M. L., PH. D., Provincial Civil Service, Madras.

The law on the subject of Succession Certificates and Curators was till 1925 to be found in two small enactments, *i. e.,* the Succession Certificate Act of 1889 and the Curators Act of 1841. In that year, all those provisions were brought into a consolidating enactment, the Indian Succession Act of 1925, which repealed a number of enactments and consolidated the law relating to succession. The present volume is therefore a commentary on those sections of the Indian Succession Act, relating to succession certificates and curators. The author is well known as a writer of text books of various branches of law and he has in this small volume given all the information on the subject noticing the decisions of the superior Courts under the various enactments, dealing with succession certificates and curators. The book wiil be found useful in solving many difficulties arising under these provisions..

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THE TRANSFER OF PROPERTY ACT AMENDING BILL.

The Transfer of Property Act (IV of 1882) has been amended in various minor particulars by about a dozen amending Acts since 1882, but there has been so far no general revision of the Act. During the forty-six years of its existence, several conflicting decisions have been given by the courts and some new principles not provided by the Act have been promulgated by recent decisions of the Privy Council. The experience of about half a century has also revealed the desirability of modifying the policy underlying some of the sections. The Legislature has now turned its attention to the desirability of a general revision, and two Bills Nos. 33 and 34 of 1927, have been published in the *Gazette of India* under R. 18 of the Indian Legislature Rules. The first is a comprehensive one of about 61 sections amending the various sections of the main Act of 1882. The second is a short supplementary amending bill dealing with consequential amendments in the Code of Civil Procedure, the Registration Act, the Specific Relief Act, the Indian Succession Act and the Married Women's Property Act, 1874.

CHAPTER I OF THE ACT.

The main changes proposed in Chapter I of the Act are the omission of the words "Hindu" and "Buddhist" in S. 2 of the Act and the new definition of the word 'notice'. As regards the first, under the existing Act, nothing in the second chapter shall be deemed *to affect* any rule of Hindu, Buddhist or Mahomedan Law. As the general sections of the Act from 5 to 53 do not go contrary to any of the existing provisions of Hindu Law as modified by the Legislature, we see no objection to the proposal to omit the words as it would be a step towards evolution of the law of property governing all sections of people in India.

As regards the new definition of the word 'notice' this is certainly an improvement on the old but we would point out that Explanation I, which declares that registration of a document, by which a transaction relating to immoveable property is affected, is by itself to be deemed to be actual notice of the instrument as from the date of registration, is somewhat too wide. In the first place encumbrance certificates granted by the registration offices do occasionally contain omissions by inadvertence or mistake. Secondly, third parties are not entitled to obtain copies of *all* registered documents. Cases may also occur where knowledge of registration of a document relating to immoveable properties is not always immediately available in the office where the properties are situate, as for instance, where moffusil properties are registered in Madras on payment of a special fee. Questions may also arise as to the point of time in the course of the same day when a transaction takes place without knowledge of a prior transaction which may be registered in the course of the day. It may be more advisable to treat the question as one of fact dependent upon the circumstances of the case especially as the recent decision of the Privy Council in *Tilakdhari Lal* v. *Kedan Lal* (1) has now settled the conflict between the High Courts on the point under discussion.

Explanation III deals with the case of notice through an agent. The proposed explanation which is undoubtedly an improvement on the old definition makes it clear that notice whether actual or *constructive* of any fact to an agent while acting in the course of the business transacted on behalf of the principal is notice to the principal. No doubt it is a rule of law that an agent stands in the place of the principal for the purpose of the business in hand and the agency "extends to receiving notice on behalf of the principal of whatever is material to be stated in the course of the proceedings." But we are not satisfied that the statutory definition will cover all the well-established limitations recognised by the decisions on the scope of the doctrine. For instance, the case of fraud on the part of the agent who, acting in furtherance of his own interests and committing a fraud on the principal, conceals the facts from the knowledge of his principal, is not clearly provided for. No doubt it may be said that in such cases as in the above the agent is acting not in his character as agent but in that of a party to an independant fraud on the principal. It is however desirable that the matter should be made clearer by an explicit provision.

1. (1920) L R 47 I A 239 : I L R 48 C 1 : 39 M L J 243 (P C).

CHAPTER II OF THE ACT.

In Chapter II, dealing with the general principles of transfer, the main amendments proposed are the following : In S. 6 of the Act, enumerating the kinds of property that cannot be transferred, it is proposed to add that "a right to future maintenance in whatsoever manner arising or secured or determined cannot be transferred". This may be accepted. The amendments proposed by Cls. (7) and (11) of the Bill in respect of Ss. 11 and 40 of the Act are stated to bring the law into conformity with English decisions subsequent to 1882, and the distinction between affirmative and negative covenants as regards their enforceability against transferees with notice is recognised and provided for.

It is no doubt true that in 1882 the Indian Legislature had before it only the decision in *Tulk* v. *Moxhay* (2) and the English Law has since then been modified. It is however very doubtful if the later distinctions between affirmative and negative covenants are not merely the common law rules and whether it is not open to Courts of Equity to adopt the more equitable view of the earlier case. The weighty observations of the Privy Council in *Lord Strath Cona Steamship Company, Ltd.* v. *Dominion Coal Company, Limited* (3) are in favour of the latter view. No doubt that was not a case dealing with immoveable properties, but the distinction, if any, is really in favour of applying the equitable principle in that case also.

Clause 8 of the Bill proposes to abolish the rule in *Leake* v. *Robinson* (4) and adopt the rule suggested by Wilson, J. in *Ramlal Sett* v. *Kanai Lal Sett* (5) and approved of by the Privy Council in *Bhagabati Barmanya* v. *Kalicharan Singh* (6), *viz.*, that where a gift to a class fails for the reasons mentioned in Ss. 13 and 14 of the Act, the failure is to be not in respect of the whole class but only so far as the gift relates to those persons who come under Ss. 13 and 14. This is quite a welcome change as it really effectuates the intention of parties. S. 102 of the Indian Succession Act is proposed to be brought into line by corresponding amendment by the Supplementary Bill. But it should be noted that Madras Acts, I of 1914 and VIII of 1921, and Hindu Disposition of Property Act, XV of 1916, should not

2. (1848) 2 Ph. 774 : 41 E R 1143
3. L R (1926) A C 108.
4. (1817) 2 Mer 363 : 35 E R 979.
5. (1886) I L R 12 C 663.
6. (1911) L R 38 I A 54 : I L R 38 C 468 : 21 M L J 237 (P C).

be repealed unless the proposed omission of the word 'Hindu' in S. 2 of the Act is carried. Even then in view of S. 6, Cl. (*b*) (3), S. 13 of the Act must be amended by the insertion of a sub-clause to the effect that a gift can be made in favour of an unborn person notwithstanding anything to the contrary in Hindu Law. The proposed repeal of the three Acts mentioned above may otherwise restore the original disqualification under Hindu Law based on the personal incapacity of an unborn Hindu to be the donee of a gift and we shall be restored to the old difficulties and anomalies which rendered it necessary to pass these enabling Acts.

Clause (9) of the Bill provides for a complete change in the old law as regards the validity of clauses directing accumulations. The maximum period for which the accumulations are permitted is reasonable and sufficient though it is not in accordance with the English Law or the principles underlying S. 13 and S. 14 of the Act. We are not however satisfied as to the necessity for extending the period in the case of the exceptions mentioned in the clause. We think a uniform period is sufficient in all cases.

Clause 10 of the Bill is supposed to safeguard the interest of persons having a right to maintenance or a provision for advancement or marriage from the profits of immoveable property and to prevent their being cheated out of their rights by a transfer of the property. The present S. 39 of the Act protects the interests of the *bona fide* transferee of such properties. It is only if the transferor transfers the property with the intention of defeating such rights and the transferee has notice of that intention that a purchaser for consideration will be affected. The proposal to omit the requirements as to the fraudulent intention of the transferor is not however desirable as the interests of a *bona fide* purchaser for value are unduly jeopardised. The position will be worse in the case of purchasers of some specific items belonging to a 'Hindu' as in such cases the claim for maintenance and marriage portions do not attach to any definite property in the hands of the owner, but at the same time there is an inchoate lien over the estate which may become definite and specific by a decree. If the proposed amendment is to be accepted, there must be a further amendment by the addition of the word 'specific' before the words 'immoveable property' in S. 39.

Clause (12) of the Bill seeks to amend S. 43 of the Act by inserting the words 'fraudulently or' before the word 'erroneously'. This is merely an amendment which makes clear the

existing law. It is proposed to limit the operation of the doctrine of "interest feeding estoppel" to the period before a decree is obtained by the transferor enforcing the transfer and to prevent the transferee from claiming the benefit of subsequent accretion of interest to the transferor, even though the decree is not satisfied. The Madras High Court decided in *Ajifuddin Sahib* v. *Sheik Budan Sahib* (7) that the contract of transfer subsists even though it is merged in the decree. The amendment now proposed takes away that right but we do not see why the transferee's equitable rights should be sought to be arrested by his getting an unsatisfied decree.

Clause (13) deals with the rule of *lis pendens*. The substitution of the word 'pendency' for the words 'active prosecution' in S. 52 removes certain difficulties felt by the court and is necessary. The proposed omission of the word 'contentious' is unnecessary. The new explanation is intended to settle conflicting decisions and is in consonance with the general trend of decisions.

Clause (14) of the Bill entirely recasts the language of S. 53, dealing with avoidance of fraudulent transfers. Following Ss.172 and 173 of the English Law of Property Act, 1925, the old section is split into two parts, one dealing with transfers intended to defeat and delay creditors and the other dealing with voluntary settlements intended to defraud subsequent transferees for consideration. This arrangement is unexceptionable. As regards the first part, the additional provision now proposed is to make it compulsory on a creditor who is avoiding a fraudulent transfer to file a representative suit on behalf of and for the benefit of all the creditors. This is a necessary provision and settles the conflicting decisions of the courts on the point. As regards the second part however it may be noted that transfers made for grossly inadequate consideration are not covered by the proposed new sub-section. Again the case of a transfer of property in favour of a charity which is of frequent occurrence in India needs to be separately provided for, *Ramsay* v. *Gilchrist* (8). It does not however seem desirable to omit from the present section the words "the prior transferees and co-owners or other persons having an interest in such property". Again the section requires to be amended so as to settle the conflict of decisions as regards the extent of avoidance of a fraudulent transfer where part of the consideration is real and part only fictitious and fraudulent. The transferee in

7. (1895) I L R 18 M 492. 8. L R (1892) A C 412.

such cases should be given a charge over the properties to the extent of the consideration properly paid by him.

One of the most important amendments proposed in the Bill is the one made by Cl. 15 which provides for the statutory recognition of the well-known doctrine of 'Part Performance'. The amendment proposes to confine the doctrine to written contracts. This restriction of the scope of the doctrine is not unreasonable. It must be however clearly provided that all the covenants in the contract are capable of being enforced as if the transfer is completed in the manner required by law to make it a valid transfer. The section as now drafted is not complete. It does not in terms provide for the enforcement of the rights under the incomplete transfer by the transferee except by the proposed addition of a new clause in the Specific Relief Act, with which we shall deal later on, and, even as regards the rights of the transferor, it does not affirmatively provide for enforcement of all covenants against the transferee. No doubt, by implication, the transferor can enforce the rights arising out of the contract so far as the properties are concerned, but it is not clear that other rights not directly involving relief against the property can be enforced. This may assume importance in case of leases. Again it would be desirable to provide for completion of the formalities required to validate the transfer as such on the first occasion when the court is called upon to recognise the rights by making its decree conditional upon compliance with such directions as may be necessary to validate the transfer. This would of course involve an amendment of the Registration Act, permitting registration of documents even after the time limit originally fixed for registration has passed. It may also be noted that change of possession actually or otherwise is not always a necessary part of the acts of part-performance, as the section assumes. There may be other acts of part-performance unconnected with possession which may let in the doctrine.

SALES.

Clause 16 of the bill proposes to amend S. 54 of the Act by making it compulsory to have a registered instrument in the case of any sale of immoveable property or of any interest in it irrespective of the value of the property. This can be accepted. The other changes proposed are merely verbal and consequential.

Clause 17 proposes to make certain alterations in respect of the vendor's lien for unpaid purchase money and the buyer's lien for advance. The sub-sections as now drafted cannot be accepted. It is difficult to see why notice of the prior

sale is to make the lien enforceable against the subsequent purchaser. What is required is that the subsequent purchaser must have notice of the non-payment of consideration and the lien which is sought to be enforced against the property in his hands. In the case of gratuitous transferees there seems to be no equity why the lien should not be enforced even in the absence of any notice. Similarly S. 55, clause (*b*) is proposed to be altered by omitting the words 'with notice of the payment'. This is even worse. It is manifestly unjust that a *bona fide* transferee for consideration should be held to suffer by a lien being allowed to be enforced against the property in his hands for advance money paid by a proposed purchaser several years prior to his transfer of which he has no notice. The really equitable provision will be to make the lien enforceable in either case against the property in the hands of all persons except those who have subsequently got an interest in it for consideration and in good faith and in ignorance of the existence of the charge. The use of the word "charge" is by itself sufficient to exclude cases of *bona fide* purchasers and mortgagees for value without notice. See *Webb* v. *Macpherson* (9) and *Alwar Chetty* v. *Jagannatha Aiyar* (10). It would be sufficient to omit the words 'in the hands of the buyer' in S. 55, clause 4 (*b*), and the words "as against the seller and all persons claiming under him with notice of the payment" in clause 6 (*b*). A sub-section is to be added in both cases that "nothing in the above sub-section shall affect any rights of subsequent transferees of the property for consideration in good faith and without notice of the charge". Clause 18 widens the scope of the right of marshalling in favour of a subsequent purchaser. It is explicitly made applicable to cases where more than two properties are involved and the extent of the right is enlarged by omitting the words "as against the seller" in S. 56. The old section was unduly restrictive and the proposed amendment carries out a desirable change, notwithstanding the fact that ordinary mortgage suits may thus become more complicated.—*S. P.*

(*To be continued*)

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9. (1903) L R 30 I A 238 : I L R 31 C 57 : 13 M L J 389 (P. C.).
10. (1927) 54 M L J 109.

SUMMARY OF ENGLISH CASES.

GALE *v.* MOTOR UNION INSURANCE CO., (1928) 1 K. B. 359.

Insurance—Motor-car—Two persons insured in two different companies—Risk covered by two policies—Liability—Rateable contribution.

A and B were insured in respect of motor-car risks in two different companies. B in driving A's car with A's consent caused damage to a third person and therefore was liable to pay damages to the third person. This risk was covered by both the policies. But the provisions in each policy were, (1) if the risk was covered by another policy the insurers should not be liable and (2) that where two policies covering the risk were in existence the insurers should pay rateably.

Held, each Insurance Company should pay half since the provision as to rateable contribution qualifies and explains the preceding clause negativing the liability.

KONSKIER *v.* B. GOODMAN, LTD., (1928) 1 K. B. 421.

Torts—Trespass—Building operations—License given by the owner to pull down chimney stack—Builder allowing the rubbish to stand for a length of time—Damage—Action for negligence and trespass—Maintainability.

The defendants, engaged in pulling down the upper storeys of a house in a street, obtained a license from the then owner of an adjoining house No. 87 to pull down part of the chimney stack of No. 87, in consideration of which they undertook to rebuild it and to make good any damage caused to No. 87 in doing any of the works. The defendants finished the work of pulling down and rebuilding, but they omitted to remove a quantity of rubbish which they had allowed to fall on the roof of No. 87. When the plaintiff was occupying No. 87, this rubbish choked the gully and the basement of the house was flooded by a heavy storm of rain. In a suit by the plaintiff for damages against the defendants,

Held, that there was no negligence on the part of the defendants because the damage did not arise from a breach of some duty on the part of the defendants to the plaintiff, but, in allowing the rubbish to remain beyond a reasonable time, the defendants were guilty of a trespass which was continuing when the plaintiff became the tenant at No. 87.

SMITH *v.* SCHILLING, (1928) 1 K. B. 429.

Practice—Several causes of action in one action—Plea of payment into court of one sum without specification—Plea, if bad—Rules of Supreme Court, O. 22—Jury trial—Assessment of damages—Interference by Court of Appeal.

A plea by the defendant that he paid into court one lump sum to satisfy three causes of action of three plaintiffs without specifying the causes of action in respect of which the payments are made is bad under O. 22 of the Rules of the Supreme Court.

A Court of Appeal is slow to interfere with the amount of damages found by a Jury and, before it is induced to do so, it must be satisfied that the Jury have either taken into account matters which they ought not to have taken into account or have neglected or disregarded matters which they ought to have taken into account.

ROYAL ANTEDILUVIAN ORDER OF BUFFALOE *v.* OWENS, (1928) 1 K. B. 446.

Income-tax—Unregistered Friendly Society purchasing premises—Conversion into convalescent home—Hospital—No expense borne by the members—Exemption from assessment in respect of premises—Income-tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Schedule A, No. VI, rule* 1 (*c*).

An unregistered friendly society, which had for its principal objects the relief of distressed members and their dependants, and the promotion of social intercourse and recreation among its members, had about two million members, most of them being working men of small means. The society purchased certain premises which were conveyed to trustees upon trust to hold them for the society. These premises were then converted into a convalescent home for the members of the society. The members of the society paid the purchase price, and the society lent moneys for the equipment and maintenance of the home. The patient was not to incur any expense either for travelling to the home or during his residence there. But only a limited number of members could enjoy the amenities of the home. There was also a staff of nurses and servants at home, and medical aid was given gratuitously by doctors.

Held that, since the home could be regarded as an eleemosynary establishment maintained by the society for the benefit of a few of its members out of many, it was a 'hospital' within the

meaning of Schedule A, No. VI, rule 1 (*c*) of the Income-tax Act, 1918, and the society was therefore entitled to exemption from assessment to income-tax in respect of premises belonging to it.

WHITE *v.* WHITCHER, (1928) 1 K. B. 453.

Income-tax—Accumulation of income under trust—Fund to be paid to beneficiary twenty years after date of death of testatrix—Whether benefit contingent on "attaining some specified age"—Income-tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *S.* 25.

A fund was by will directed to be accumulated for twenty years from the death of the testatrix when it was to be divided among the then living children of a certain marriage. There was one such child living at the date of the will and no more were ever born although the parents survived the testatrix. The twenty years having expired, the child became entitled to the whole fund.

Held that the fund had not been accumulated for the benefit of the said child "contingently on his attaining some specified age" within S. 25 of the Income-tax Act, 1918, so as to entitle him to repayment of a sum in relief of tax under that section.

H. J. GREEN *v.* J. GLIKSTEN & SON, LTD., (1928) 1 K.B 475.

Income-tax—Insurance against fire—Loss of stock in trade by fire—Receipt of insurance money to be included in the trading account—Income-tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case* 1.

Where a company carrying on timber business lost a large part of their stock by fire but the loss was covered by insurance,

Held, that the money actually received by the company from the insurance company in respect of the timber destroyed must be brought into the trading account for the purpose of income-tax but not the figure representing the estimated cost price of the timber.

REES ROTURBO DEVELOPMENT SYNDICATE, LTD. *v.* INLAND REVENUE COMMISSIONERS, (1928) 1 K. B. 506.

Income-tax—Excess Profits Duty—Sale of patent rights—Capital asset or profit of circulating capital—Liability to assessment—Commissioner's finding insufficient—Income-tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D.*

The assessee (company) was assessed to income-tax and excess profits duty upon a certain sum which represented the share of the company in respect of the sale price of the patent rights in the United States of America of the group of patents relating to centrifugal, turbine and similar pumps, which it was the purpose of the company to acquire and turn to account by licenses or by sale. It was contended by the assessee that this sum was a capital asset and not a profit of the circulating capital. The Special Commissioners found that the profits on sale of patents arose in the course of the Company's business and were chargeable to income-tax and excess profits duty.

Held by Lord Hanworth, M. R., and Sargant, L. J., (Scrutton, L. J., dissenting) : The finding of the Commissioners was not that the profit was realised as part of its ordinary trading and was not in itself a sufficient finding of fact and the sale of the patent rights was not a profit of circulating capital but a transmutation of capital asset into money.

LORD TREDEGAR *v.* HARWOOD, (1928) 1 Ch. 59.

Landlord and Tenant—Lease—Covenants—Lessee to insure in the Law Fire Office or "in some other responsible Insurance Office to be approved by the lessor"—Right of lessee to select alternative responsible office—Desire of lessor that all houses on estate should be insured in one office—Whether a ground for refusal of approval.

A lessee covenanted to keep demised premises insured in his own name and that of the lessor in the 'L' office,..... "or in some other responsible insurance office to be approved by the lessor....." The defendant the assignee of the lease did not continue the policy in 'L' office but took out a policy in a different company. The plaintiff (lessor) refused to approve of the latter company on the ground that for the purposes of estate management he required that all houses upon his estate should be insured in the same office.

Held, the lessor could not insist upon the premises being insured in the 'L' or any other particular office. The covenant conferred an alternative on the lessee to select any other office he might choose provided it was a responsible one. The lessor, who had the right of approval, must exercise that right reasonably and not capriciously; not with a view to his personal ends but solely with the object of finding whether the company selected by the lessee was "responsible" and a suitable company for the undertaking of the risk.

HARRINGTON MOTOR CO., *In re* : CHAPLIN, *Ex parte*, (1928) 1 Ch. 105.

Company—Winding up—Injury caused by negligence of company's servant—Judgment for damages and costs in action against company—Subsequent liquidation before levy of execution—Payment by insurance company to liquidator of damages and costs—Right of judgment-creditor to the amount.

A limited company which was insured against third party risks was sued by the applicant for damages and costs for personal injuries caused to him by the negligence of one of its servants. The applicant recovered judgment and, before he levied execution, the company went into liquidation and the insurance company paid the amount of damages and costs to the liquidator. The applicant claimed that the moneys so paid should be handed over to him and must not be available for distribution among its general creditors in the winding up.

Held, that the applicant had no right either at law or in equity to require that the money should be handed over to him; but that the money formed part of the assets of the company and was as such available for distribution among its general creditors including the applicant.

COLLAROY CO. *v.* GIFFARD, (1928) 1 Ch. 144.

Company—Preference shares and ordinary shares—Priority of preference shares as to dividend and capital—Winding up of company—Surplus assets—Right of preference share-holders to participate.

The memorandum of articles of association of a company provided that the capital was divided into preference shares and certain ordinary shares and that the preference shares should confer the right to a fixed cumulative preferential dividend at a certain rate on the capital paid up thereon and shall rank both as regards dividends and capital in priority to ordinary shares.

Held, that the memorandum having provided for the right of the preference share-holders, the preference share-holders would be entitled only to a return of their capital in the event of their winding up and would not be entitled to participate in the surplus assets.

CREDITON GAS CO. *v.* CREDITON URBAN COUNCIL, (1928) 1 Ch. 174.

Contract—Non-mention of duration—Determination by notice.

An agreement under seal was entered into between a gas company and a district council by which the company agreed to light all the public lamps within the district from and after the 1st day of September every year up to the following 1st day of May inclusive. The period for which it was to run was not mentioned in the agreement nor was express power to determine given under it.

Held, that, though the agreement was indefinite in point of time, the very nature of the contract implied that either party could determine it by notice.

ROYAL EXCHANGE ASSURANCE *v.* HOPE, (1928) 1 Ch. 179.

Insurance (Life)—Assignment of the policy—Time limit for the risk—Extension of the time by the assured—Endorsement on the policy with the new time limit—No notice of the extension to the assignee—Rights of the assignee to the sum insured—Trust—Variation of the original contract and not a new contract.

By a policy, dated August 13, 1925, one Samuel Barker effected an insurance upon his life for the term of one year from July, 31st, 1925, with an insurance society. The insurance society agreed to pay the assured, or his executors, or his assigns the policy money in the event of the death of the insured on or before July 31st, 1926. Barker assigned the benefit of this policy to the defendant in July, 1926, the assured arranged for an extension of the period of insurance to October 31st, 1926, and to this effect an endorsement, namely, " that the sum assured shall be payable in the event of the death of the life assured on or before 31st October, 1926", was made on the policy. The benefit of extension of time was not assigned to the defendant. When the insured died on October 1, 1926, his executors brought an action for a declaration that they and not the assignee defendant were entitled to receive the sum assured.

Held, that the extension of the policy by the insured did not constitute a new contract but was merely a variation of the original contract and therefore the defendant was entitled to the policy money.

Even if it was regarded as a new contract it must be treated that the deceased by a new contract effected an enlargement of the time-limit acting as trustee for the defendant and therefore the defendant could enforce her rights as a beneficiary.

In re A Debtor, (1928) 1 Ch. 199.

Bankruptcy—Receiving order—Petitioning creditor utilising bankruptcy proceedings for extortion of money from the debtor—Receiving order discharged—Bankruptcy Act, 1914(4 *and* 5 *Geo*. 5, *c*. 59), *S*. 5, *Sub-section* 3.

Where a creditor utilized bankruptcy proceedings for the purpose of extorting or attempting to extort money from the debtor for which the debtor was in no sense liable,

Held, that the proceedings constituted an abuse of the process of the court and therefore no receiving order ought to be made.

BROOKS, *In re* : PUBLIC TRUSTEE *v*. WHITE, (1928) 1 Ch. 214.

Will—Construction—Residuary Gift—Life interest to the widow of the testator—Remainder to children or their "personal representatives"—Meaning of.

A will provided that the trustees should pay the income to the testator's widow during her life, and from and after her death the income should be distributed equally between the seven children of the testator during their respective lives, and from and after the death of any child whether in his life-time or after his decease, the trustees should hold 1|7th of the capital of the estate to the income of which such child should have been entitled or in the case of a child predeceasing the testator such share as would have accrued to such child under the will if he or she had survived the testator, upon trust for " personal representatives" of the child.

Held, that the words " personal representatives" should be construed as meaning "executors or administrators" and not as next of kin and, therefore, on the death of widow the seven children became absolutely entitled to their respective shares in the testator's residuary estate.

MESSAGER *v*. BRITISH BROADCASTING CO., 97 L. J. K. B. 65.

Copyright—Broadcasting an opera—Whether an infringement—Copyright Act, 1911 (1 & 2 *Geo*. 5, *c*. 46)—*Contract—Assignability.*

The plaintiff, a composer of an opera, granted an exclusive license for the performance thereof, under an agreement, to a well-known theatrical producer, George Edwards. After George Edward's death, his successors-in-title agreed to permit a wire-

less performance by the defendants for £60. The plaintiff was not informed of this; and the defendants gave a broadcast performance of substantially the whole opera. In an action by the plaintiff for damages for the infringement of the copyright,

Held, that there was an infringement of the musical copyright by the defendants as broadcasting an opera by wireless telephony amounted to 'perform' it in 'public' within the meaning of the S. 1, Sub-section 2 of the Copyright Act, 1911, and

(2) that the license granted by the plaintiff to George Edwards was personal and not assignable.

COTTAGE CLUB ESTATES *v.* WOODSIDE ESTATE CO., 97 L J K. B. 72.

Arbitration—Contract with an arbitration clause—One of the contracting parties assigning his rights under the contract to another—Disputes—Jurisdiction of the arbitrator.

A building contractor entered into a contract with a building owner for the construction of houses. The contract contained an arbitration clause. Before the completion of the contract, the contractor assigned in writing his rights to all moneys due and to become due under the contract to a third person, and notice of assignment was served on the building owner. After the completion of the work, disputes arose as to the amount due to the contractor from the owner and the matter was referred to arbitration, and an award was passed by the arbitrator that the contractor was entitled to recover certain sum of money from the building owner.

Held, that the deed of assignment and notice precluded the contractor from maintaining his claim against the building-owner.

An arbitrator has jurisdiction to deal with a dispute between the parties to a contract in the terms of an arbitration clause in the contract, notwithstanding that one of the parties has by assignment divested himself of his rights to claim under the contract, but in dealing with the dispute the arbitrator must not merely consider the terms of the contract within the limits of the document, but must consider the application and enforcement of those terms having regard to the legal position which has been created by the assignment.

INLAND REVENUE COMMISSIONERS *v.* YORKSHIRE AGRICULTURAL SOCIETY, 97 L. J. K. B. 100.

Income-tax—Agricultural Society—" Body of persons established for charitable purposes only"—Income of invested funds —Exemption as charity—Income-tax Act, 1918, *S.* 37, *Sub-section* 1 (*b*).

A County Agricultural Society was formed in 1837 for the purpose of holding an annual agricultural show of livestock, implements, etc., to provide for agricultural education, and to promote the interests of agriculture generally. The Society always held an annual show in some town in the county and prizes were awarded on general competition. It had over 3000 members, the annual subscription of each member being £1. The members enjoyed certain privileges during the annual shows. The Society claimed exemption from income-tax on the interest and dividends of its invested funds on the ground that the society was a "body of persons established for charitable purposes only" within the meaning of S. 37 (1) (*b*) of the Income-tax Act, 1918. The Special Commissioners granted the exemption, but, Rowlatt, J., reversed the decision.

Held (on appeal), that the Society was entitled to exemption from tax because the objects of the Society were wholly beneficial to the community at large. The fact that the members of the Society enjoyed certain privileges did not make it a members' society and prevent the general objects from being charitable.

JOTTINGS AND CUTTINGS.

Marriage between Relatives.—Sir Arthur Shirley Benn has introduced into Parliament a Bill to amend the law relating to the marriage of persons with their nephew or niece by marriage. The state of the law on this subject is admittedly quite illogical, and shows the mischief of piecemeal legislation, particularly in matters which affect the status of individuals. As a result of years of effort, the Deceased Wife's Sister's Marriage Act of 1907 legalised marriages between a man and his deceased wife's sister; but it went no further, and Astbury, J., held in *Re Phillips* (1919, 1 Ch. 128), that the Act did not enable a man to marry the daughter of his deceased wife's sister, although, so far as degrees of consanguinity are concerned, she is, of course, a step further removed. And the Act of 1907 was not even reciprocal as between the sexes, for it did not enable a woman to marry her deceased husband's brother; this right was given by the Deceased

Brothers' Widow's Marriage Act of 1921. Sir Arthur Shirley Benn's Bill proposes to legalise marriage between a man and

"(1) his deceased wife's brother's daughter;
"(2) his deceased wife's sister's daughter;
"(3) his father's deceased brother's widow;
"(4) his mother's deceased brother's widow;
"(5) his deceased wife's father's sister;
"(6) his deceased wife's mother's sister;
"(7) his brother's deceased son's widow;
"(8) his sister's deceased son's widow".—*L. J.*, 1928, p. 179.

Doctors and Lawyers :—It is a strange phenomenon, when doctors and lawyers meet, dine and converse, that the conversation and speeches are always tinged with lunacy; there is much talk about the irresistible impulse and cognate matters; and one of the legal speakers will meet and defy the arguments of the alienists. Apart from such matters, the evening will invariably end on a note of mutual admiration and respect; and the guests go home contented ; each feeling that he belongs to the noblest, most useful and most altruistic profession in the whole wide world of human activity.

Sir Ernest Wild's jest touching the extinction of barberism in both professions has left me guessing. Does it mean that doctors as lawyers have taken the Nazarite vow? The barber and the surgeon were, of course, at one time of the same profession, but that does not throw more light on the matter. Or is it that uncertainty has so far been removed from the two sciences that the patient and the litigant are less liable than formerly to the "close shave"? I wish I knew.—*L. J.*, 1928, p. 194.

Lord Phillimore :—Mr. Punch's Personality of the week is our own Lord Phillimore, and Mr. Bernard Partridge has happily portrayed him seated at his desk perusing an open volume, *Horatii Carmina*, with a game of "patience" lying near. "To Orthodoxy wed, Learned in Classic lore, He lives with Patience close in touch, And Justice in his head; We could not love all these so much Loved we not Phillimore". *Punch* has done the great man justice, with pen and pencil.

A learned man and a godly, he has ever been. We have all heard of his reproof of the nervous witness who unconsciously

maltreated the sacred Testament during an anxious sojourn in the witness box. He it was who refused to help Barnes, J. (afterwards Lord Gorell) in the Divorce Court, because he had a deep-rooted conscientious objection to divorce. "At this rate," observed Barnes, J., on hearing of his refusal, "we shall soon have a Unitarian judge refusing to sit with the Trinity Masters". —*L. J.*, 1928, p. 194.

Hilary :—"Why," writes a person of enquiring mind, who signs himself, appropriately enough, "Law Student", "are the present sittings called the Hilary Sittings?" Personally, I neither knew nor greatly cared until the question was asked; but I have searched out the matter, and the answer is as follows: In remote and pious days the sittings of the Courts after Christmas were made to date approximately from the Feast of St. Hilary of Poietiers, which fell on January 13. The matter is now regulated, and the name "Hilary" applies authoritatively to the term by O. 63, R. 1, which declares that the Hilary sittings shall commence on January 11 and terminate on the Wednesday before Easter. May I add, to bring the matter up to date and beyond, that the term will end this year on April 4. The most puzzling thing about these terms and vacations is that there are many days which are neither "sittings" nor "vacation". For example, "the Easter sittings shall commence on the Tuesday after Easter Week," says R. 1. "The Easter Vacation," says R. 4 (1) (of the Order aforesaid), "shall commence on Good Friday and terminate on Easter Tuesday." Let this curious matter be reserved for further investigation.—*L. J.*, 1928, p. 219.

Celibacy and Longevity :—I have been assured, by a man who claims to have seen the authentic figures, that married men live longer than bachelors; if this be so, the age-old antagonism which exists between the married and the celibate is further explained. Not only does the bachelor enjoy his notorious privileges and immunities, but he contrives a more timely exit than his married brother from this vale of tears and taxation.

There is, of course, Sir Harry Poland, who sustained the burdens of celibacy for nearly a century and who in odd moments of piety went on to the last thanking Heaven that he was a confirmed bachelor. "If I had married," said he, at the dangerous age of ninety-four, "I might have been bothered by children, or, perhaps, even disgraced by them. As far as I can see, married life is so much worry. . If I had married I should

have been dead long since." Well, if Peter Poland, his father, had been of the same mind, Sir Harry would never have established the Bar record for longevity ; many murderers would not have died, and some of them, married and single, would have lived to a ripe and respected old age. There is no denying, while paying all due regard to the maxim, *De mortuis nil nisi bonum,* that in some respects Sir Harry was a man of narrow and unsocial views. And in disclosing one of the secrets of old age, it is curious that he should attribute to celibacy what other ancients have accounted for variously by the practice and pursuit of dieting, over-eating, temperance, intemperance, virtue, and the moderate indulgence in various vices. Sir Edward Clarke, characteristically enough, takes the happier and the better view ; and he has shown that for his length of days his wife is greatly to thank. —*L. J.*, 1928, p. 219.

Speeches : The Influence of Laudanum :—A recent reference to the fine speeches (formerly) made by counsel and others while "under the influence of drink" has caused one to remind me that many of Erskine's best deliverances were made under the influence of laudanum. It was said of him that his vivid imagination supplied him with forcible images—which, clothed in language of transparent beauty, never failed to carry the jury along with him. And their oratorical achievement was due in part to his high animal spirits ; and in part to the exciting effect of the drug upon his imagination.

He had another foible, not dissimilar to that of a languid silk of recent times. He was in the habit of pretending that he did some of his best things without forethought or preparation, out of the treasury of his mind, and on the impulse of the moment. In fact, Thomas Erskine, like others of his kind, was a secret worker.—*L. J.*, 1928, p. 219.

And Old-Fashioned Fees :—From age to age the fees of barristers have varied; the salaries of the Judges alone, between opposite ends of the same century, remain in a state of equilibrium. At the trial of the Seven Bishops, in the reign of the Second James, the largest fee paid to counsel for defending a Bishop was 20*l.*; and the total fees paid to all defending counsel was 240*l.* 16*s.* In Commonwealth days lawyers were supposed to do well. "Nor are their fees of mean value," says an old writer; "three pounds, five pounds, six pounds being usual even for the making of a motion of five or six lines. Many of them

rise from nothing to great estates; five thousand pounds, six thousand pounds, nay, ten thousand pounds by the year, and purchase baronies and earldoms." In the spacious days of James II the law officers enjoyed the emoluments of private practice; and it was perhaps as well. For the official salary of Sir Francis Bacon, A. G., was 81*l*. 6*s*. 8*d*.; Sir Henry Yelverton, S. G., 70*l*.; the King's Sergeant, 41*l*. 6*s*, 10*d*.; and Henry Martin, advocate for ecclesiastical causes, 20*l*.

The pounds seem scandalous; to say nothing of the shillings and the pence.—*L. J.*, 1928, p. 244.

Hungaro-Rumanian Dispute :—By a strange reversal of opinion since last autumn, when the British Foreign Secretary chided Hungary for standing on its Treaty rights as to the lands of Hungarians expropriated by Rumania in Transylvania, it is now Rumania's turn to feel the displeasure of the League Council. The legal aspect of this long drawn-out dispute was dealt with *in extenso* in an article in the *Law Journal* of October 22, 1927, and it is only necessary to recapitulate the simple facts; that there was a special article in the Treaty of the Trianon purporting to preserve the rights of Hungarians in their estates in the Province of Transylvania which was handed over to Rumania by that treaty; that Rumania subsequently passed an agrarian law for the compulsory acquisition of all land deemed fit to be broken up into smaller holdings; and that one result of this law was that the Hungarian owners found themselves dispossessed on payment of compensation which they said represented in the majority of cases only a fraction of the value. Most of the dispossessed owners resorted to the Mixed Hungaro-Rumanian Tribunal set up under the Treaty for redress, but Rumania, declaring that that tribunal was not competent to try an issue that affected the domestic economy of the whole country, prevented any final decision by withdrawing its representative. Hungary appealed to the League Council to appoint a Judge in accordance with the Treaty in order to enable the tribunal to adjudicate in the matter, and alternatively offered to accept the arbitrament of the permanent Court of Justice at The Hague. Rumania refused both alternatives, and the League sub-committee entrusted with the matter made an oracular recommendation, which, if it meant anything, would have involved Hungary giving up its legal claim. Both countries were exhorted for the third or fourth time to settle the matter.—*L. J.*, 1928, p. 245.

The League Decision :—Meanwhile, weighty legal opinion was making itself felt in favour of the tribunal being placed in a position to adjudicate in a matter in which it was obviously competent to do so. The voices of several leading British lawyers were raised in the House of Lords, including those of Lord Buckmaster, Lord Phillimore, and Lord Carson, against Rumania's obstruction, and the influence of Lord Rothermere's newspapers in favour of giving the Hungarian claims a fair hearing made itself felt on the Continent. The Rumanian Government has published the opinions of fifteen distinguished jurists of several countries in favour of its plea that any decision in favour of the Hungarians would infringe its sovereignty, but all of them, including that of Professor Pearce Higgins, K. C., seem to be more governed by a consideration of political expediency than of treaty rights and contractual obligations. In the result the League Council decided, in view of the failure of the disputants to come to a settlement, to recommend them to agree to the appointment of two additional Judges from neutral countries to sit on the tribunal under Article 239 of the Treaty, and that the Rumanian member should resume his seat. Hungary agreed, and it now remains to be seen if Rumania will follow suit. Czecho-Slovakia will shortly be faced with a similar problem in respect of expropriated Hungarian landowners, so the League Council may be forgiven for its somewhat inconsistent efforts to preserve the peace by a settlement out of Court.—*L. J.*, 1928, p. 246.

Copyright in a "Slogan" :—The first reported decision of Mr. Justice Humphreys in a civil case is, unfortunately, one of rather doubtful authority on the much-contested field of "originality" in matters of copyright. The plaintiff in the action, an electro-therapist, claimed literary copyright for the slogan adopted by him in advertisements of his treatment, that beauty or youthfulness was "a social necessity, not a luxury," and the defendant, a beauty specialist, was said to have infringed this copyright by using the words "social necessity" in one of his advertisements [*Sinanide* v. *Brown* (*Maison Kosmeo*), *The Times*, March 8]. The learned Judge, basing himself on the undisputed law that there may be copyright in literary matter or a book even if it is used as an advertisement, held that there was also "originality" in the plaintiff's slogan "because it was so obviously untrue," and so, in his judgment, the phrase came within the language of the Copyright Act, 1911, as being the

subject of copyright—and he granted an injunction, with nominal damages and costs. The case is rather like the well known one of *Dicks* v. *Yates* (18 Ch. D. 77) where the Court of Appeal (reversing Bacon, V. C.) refused an injunction against the use of the arresting words "Splendid Misery" in the title of a novel, Jessel, M. R., and Lush, L. J., on the ground of lack of originality or likelihood of mistake on the part of the public, and James, L. J., on the ground that there had been no infringement. This is the decision which has hitherto held the field in matters of this kind, and one may respectfully express the hope that it will not be shaken by this recent "slogan" judgment.—*L. J.*, 1928, p. 247.

"Hotel" Divorces :—During the last two years those whose business keeps them in the Divorce Court have not been able to escape the impression that wives' divorce suits, the charges in which are based merely on some incident of recent occurrence at a hotel, have been markedly on the increase. It has been a usual thing to hear when the undefended list is being taken that a husband has become associated with some other woman, whose identity could be ascertained without much difficulty, but that the offence is charged with some "woman unknown" on a solitary occasion, evidence of which comes to the wife in the form of a letter from the husband, enclosing a hotel-bill. It is this class of case against which twice within a week the President, Lord Merrivale, inveighed. In his first warning on March 12, he said that any case brought before the court on such flimsy material known as "hotel evidence" threw discredit on the administration of justice. On that occasion he adjourned two cases for further inquiry. But on Monday, in *Aylward* v. *Aylward* (*Times*, 20th inst.) he went further and dismissed a petition, intimating that he would no longer sanction this sort of proceeding, and hinting that only an Act of Parliament could compel him to do so.—*L. J.*, 1928, p. 248.

A Point of Etiquette :—It is understood that the Bar Council will be asked to give a ruling on a point of professional etiquette; namely, whether Counsel may, with propriety, remind the jury in a murder case of the punishment which will normally follow a verdict of guilty. It will be remembered that the Lord Chief not long ago administered a rebuke to Mr. Valetta for doing this, "not once, but five times," and observed that the jury's sole concern was with their verdict and not at all with the consequences of that verdict. Death might or might not ensue.

In the temple there is still much discussion on the matter; and I have been moved to look at the precedents. One thing is certain; if Mr. Valetta offended, he did so in a very large and very distinguished company. Even Sir Edward Clarke, a model of propriety, when defending in murder cases, did not fail, as in the Penge case (four times) and the Bartlett case (once), to remind the jury that the issue was one of life and death. The reports of murder trials are indeed thickly strewn with instances, many of them modern. The question would appear to be how much counsel may, in the future, tell the jury of the punishment of crime; and the mode in which he should tell it. The telling itself is from of old, and in the tradition.—*L. J.*, 1928, p. 264.

THE INDIAN BAR COUNCILS ACT.

Notification by the Government of India.—In pursuance of sub-section (3) of S. 1 of the Indian Bar Councils Act, 1926 (XXXVIII of 1926), the Governor-General in Council is pleased to appoint the 16th day of July, 1928, as the date on which the provisions of the said Act not yet in operation shall come into force in respect of the High Court of Judicature at Madras.—*No. F* 994|27, *Judicial, Home Department, dated 27th March,* 1928.

Notification by the High Court.—Notice is hereby given with reference to S. 8 sub-section (2) of the Indian Bar Councils Act 1926, that all persons, who are advocates or vakils entitled as of right to practise in the High Court, Madras, and who wish to have their names entered in the roll of Advocates to be maintained under the Act, shall pay on or before the 2nd July, 1928, the fee of ten rupees payable to the Bar Council to the Registrar of the High Court, who shall be the Secretary to the Council for the time being.

2. The fee can be paid to the Accountant of the High Court on days on which the High Court will be open for the transaction of urgent business during the vacation, *i.e.*, on Mondays and Tuesdays every week.—*R. O. C. No.* 1401 *B*-1|28, *dated 3rd May,* 1928.

BOOK REVIEWS.

ADVOCACY SERIES, VOL. II—CROSS-EXAMINATION ADAPTED TO PARTICULAR CLASSES OF WITNESSES, by P. Ramanatha Aiyar, B.A., B.L., Vakil, Trichinopoly and N. S. Ranganatha Aiyar, B.A., B.L. Price Rs. 4.

An interesting variety of witnesses and their evidence is so amply illustrated in this volume that we wonder how a subject like this has been rendered quite as fresh and attractive as any book of short stories. But, that we feel rather entertained than profitably engaged in going through these pages, may be the impression left on the mind which probes into the final value of such a publication. We are, of course, not far from realising that, in the attempt to give us the many kinds of witnesses and their answers, the book does not equally abound in instructions regarding the methods of handling them. Nevertheless the reader may not be entirely warranted in the conclusion that the subject of witnesses and their examination has not been dealt with fully. For, do we not persuade ourselves to expect that, in the exhaustive treatment of "The Art of Cross-examination", which the authors have planned out, they may yet provide us with the most necessary and useful information? The subject is an essential one and ours is the gain when we are given an insight into the workings of the human brain, especially in the witness box. The best intellect quails there sometimes, while the least truthful witness scores a victory. The manifold types of witnesses, of which this volume is full, convey to us that, however much the individual mind may be confident of its strength, it more often gives way before the clever art of the cross-examiner, though quite amusingly enough, even the adept advocate gets frustrated, at times, by an intrepid answer from the box. We are glad to receive this volume in quick succession to the first of the series.—*K. C.*

"TRIAL OF THE DUCHESS OF KINGSTON." Edited by Lewis Melville. Published by Messrs. Butterworth & Co., Ltd., Calcutta. Price Rs. 6-8-0.

The volume under review deals not with a case of gruesome murder by poisoning or otherwise as in most of the prior volumes of the Notable Trials Series but with a case of bigamy. The accused, a Peeress of the British Realm, claimed to be tried by her peers, and we have now before us the full records of a famous trial which took place more than 150 years ago in the historic Westminster Hall, before as many as 118 Peers. The reader gets an insight into the so-called high society life in England in those days, but to the lawyer the interest will mainly be in the able and lucid arguments on an important question of law—how far the decision of an English Ecclesiastical Court on the question of the subsistence or otherwise of a

marriage between two persons will conclude the trial of an indictment for bigamy. The arguments of four Counsel on the side of the defence and of an equal number on the side of the prosecution are given *in extenso,* and in fact they cover half the volume. As our readers are aware the Duchess of Kingston's case is always quoted in text-books as a leading case on *Res judicata.* Apart from this, the trial was a solemn farce as predicted by Lord Mansfield even at the very commencement, for, the Duchess, though unanimously found guilty, claimed successfully "the benefit of the Peerage" according to the Statutes, and was immediately discharged!

It is needless to say that the volume maintains all the well-known features of the Notable Trials Series, and is a welcome addition which we heartily recommend to our readers.

Is HARTAL ILLEGAL? by Mr. N. C. Sen Gupta, M.A., D.L., Advocate, Calcutta High Court. Published by M. C. Sarkar and Sons, Calcutta.

This is a pamphlet of absorbing interest at the present day when *hartals* are becoming more frequent. It is not altogether easy to suppress one's political inclinations even in a purely legal discussion on a question like this. Mr. N. N. Sircar has come to the conclusion in his monograph that *hartal* is illegal and the promoters of the same are liable, to which this pamphlet is pubilshed as a rejoinder. Mr. Sen Gupta has in his discussion of the subject completely succeeded in avoiding political considerations. Whatever may be the ultimate conclusion to which one may come on the question, the arguments advanced are entitled to respectful consideration even by those who do not agree with the conclusion arrived at. On the question of the principle on which the interference with third persons' contracts is concerned, we would refer to the statement of Viscount Haldane in delivering the judgment of the Judicial Committee of the Privy Council in *Jasperson* v. *Dominion Tobacco Co.* (1), where His Lordship lays down: "The reason on which this conclusion rests is one which is now established. Interference directed to bring about a violation of legal right, such as that of respondent company to have their contract with Deacon duly observed, is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

1. L R (1923) A C 709 at p. 712 (P C).

and *Lumley* v. *Gye* (2) and *Quinn* v. *Leathem* (3) are relied on by His Lordship. After these decisions have gone into fabric of English law, it may not be profitable to examine whether *Lumley* v. *Gye* (2) was decided correctly. It will probably be found that when many of our modern legal conceptions are traced to their source, the grounds on which they rest may not be found very clear or definite.

THE ENGLISH CONSTITUTIONAL LAW, by Jyoti Prasad Sarvadhikari, M.A., B.L., 2nd Edition, 1928. Published by Eastern Law House, Calcutta. Price Rs. 5-8-0.

The appearance in this hand-book of English Constitutional Law is opportune at this moment when the revision of the Indian constitution is being contemplated. As representative institutions modelled on the English system are sought to be established here with the necessary modifications, a clear exposition of the fundamental principles of the English constitutional law examining the ideas underlying the structure of the state with its different organs, the legislature, the executive, the judiciary and the crown with its prerogatives, is of value. The comparisons that have occasionally been made in the work with the American, French and other systems will also be found useful. The new chapter that has been added in this edition, *i.e.*, with regard to the Indian constitution, enhances its value and will be helpful in having a historical survey of India's constitution since its British connection. We are sure that the book will be appreciated not merely by the students but by lawyers as well.

PARTITION IN BRITISH INDIA, by Debendranath Datta, B.L. Published by Messrs. Butterworth & Co., Calcutta.

As the system of joint family is very common among the Hindus, the law relating to partition is bound to occupy a prominent place in the law of the country. The rules of substantive law on the subject are not many and the author has devoted himself largely in the work to the practice and procedure in partition suits until the final allotment by metes and bounds. Numerous difficulties arise at several stages in working out the rights of the sharers and the learned author has dealt with them all noticing the decisions in their appropriate places. The book is the first of its kind and will be found useful to practitioners, judges and commissioners engaged in partitioning estates.

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2. (1853) 2 E & B 216 : 118 E R 749.
3. L R (1901) A C 495.

THE LAW OF ARBITRATION IN INDIA, by Mr. K. J. Rustomji. Published by Messrs. Butterworth & Co., Calcutta.

This is an exhaustive and critical commentary on the Indian Arbitration Act by Mr. K. J. Rustomji, who is already well-known to us as the author of several treatises. The author or his work does not therefore need any special commendation from us. It is sufficient to say that he has made available through his work to the lawyers all the learning on the subject contained in the English treatises and reports, which are not easily accessible in the mofussil. The volume under review fully justifies the expectations raised by the name of its author and will find its place in the library of lawyers and judges.

THE LAW OF PRE-EMPTION, by Dattatraya Waman Kathalay, B.A., L.L.M., Advocate, Central Provinces. Published by Pushpak House, Nagpur. Price Rs. 21.

This is the most exhaustive treatise on the Law of Preemption in British India being mainly a statement of the Muhammedan Law of Pre-emption in the form of a Code with comments thereon and commentaries on the Pre-emption Acts of the various Provinces in British India. The examination of the law of Pre-emption from the juristic point of view in the opening chapter and the references to the analogous laws in the jurisprudence of other countries are bound to be of great interest. The author is entitled to the gratitude of lawyers for his research in comparative jurisprudence on this subject. The statement of the Muhammedan Law of Pre-emption in the form of a Code will tend to a clear understanding of the principles on the subject and the commentaries will tend to amplify them in the light of the decisions. The various provincial enactments with the exhaustive commentaries thereon will be highly valued in the several Provinces. Their collection in one volume will also help a comparative study of the various enactments and their provisions. We are sure that this work will shortly take its place among the foremost legal treatises in this country.

[END OF VOLUME LIV.]

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NOTES OF INDIAN CASES.

BANKU BEHARI CHATTERJI *v.* NARAINDAS DUTT, (1927) I L R 54 Cal. 500 : 52 M L J 565 (P C).

This decision of the Judicial Committee of the Privy Council is of more than passing interest in the law of limitation and procedure relating to the execution of decrees. The facts of the case are more fully set out in the report of the decision of the High Court in *Narain Dass Dutt* v. *B. B. Chattopadhya* (1). The mortgagor had effected four successive mortgages on his properties and the first mortgagee brought a suit in the High Court of Calcutta on his mortgage impleading the subsequent mortgagees as parties. A composite decree was passed giving each one of the mortgagees right to execute the decree and bring the properties comprised in their respective mortgages to sale; the same decree, apparently, also provided for the personal remedy of the several mortgagees against the other properties of the mortgagor. At the instance of the first three mortgagees, the properties comprised in the mortgages were sold. After 12 years of the decree but less than 3 years after the mortgaged properties were sold at the instance of the other mortgagees, the fourth mortgagee who had taken no steps in the interval applied to execute the personal portion of his decree by attaching and selling the other properties of the mortgagor and the question was whether such an execution application was in time with reference to Art. 183 of the Limitation Act. Their Lordships have answered it in the negative upholding the decision of the High Court. It may perhaps be noticed that the mortgage decree in the case was one passed under the Transfer of Property Act and not under the Civil Procedure Code of 1908.

1. (1924) 78 I C 1001.

The observations of their Lordships on the question of limitation applicable to mortgage decrees have therefore to be understood with reference to the facts abovementioned as they are liable to be misunderstood, if divorced from their context. For instance, we do not understand that their Lordships have said anything to shake the authority of the cases which have held that in cases where a mortgage decree is passed in strict conformity with the forms in the Code, the decree-holder has 12 years under S. 48 of the Civil Procedure Code and Art. 182 of the Limitation Act to execute the final decree for sale in a mortgage suit, *Somar Singh* v. *Deonandan* (2), and that after all the mortgaged properties are sold, he has still three years under Art. 181 of the Limitation Act from the date when the sale becomes absolute for applying for a supplemental personal decree under O. 34, R. 6. *Rama Venkatasubba Aiyar* v. *Shanmukam Pillai* (3), *Raj Narain Mal* v. *Santi Lal* (4), *Pell* v. *Gregory* (5) and he will have another 12 years to execute the personal decree under S. 48 of the Civil Procedure Code or Art. 183 of the Limitation Act. In the case under notice the decree was a composite one against the mortgaged properties and the person or the other properties of the mortgagor and was therefore not affected by the decisions referred to above. Such a composite decree is not illegal and reference may be made in this connection to *Jeuna Bahu* v. *Parmeshwar Narayan Mahtha* (6), *Darbari Mal* v. *Mula Singh* (7) and *Pell* v. *Gregory* (5). In the case of such a decree by the High Court, it is not clear from what date time would run for the execution of the personal portion of the decree. Cf. *Khulna Loan Company* v. *Jnanendra Nath Bose* (8), *Aiyasamier* v. *Venkatachela Mudali* (9), *Nawab Shujaulmulk Bahadur* v. *Umirul-umra Bahadur* (10).

Coming to the second question, their Lordships have held that when a decree is transferred for execution to another court, the transferring court only performs a ministerial act in transferring the decree and the question whether execution of the decree is barred by limitation or not is a matter falling to be decided by the court

2. (1927) 8 Pat. L T 379. 3. (1913) M W N 867.
4. (1922) 21 A L J 37. 5. (1925) I L R 52 C 828 (F B).
6. (1918) L R 46 I A 294 : 36 M L J 215 (P C).
7. (1920) I L R 42 A 519. 8. (1917) 22 C W N 145.
9. (1916) I L R 40 M 989 : 31 M L J 513 (F.B).
10. (1925) I L R 48 M 846 : 49 M L J 498.

to which the decree is transferred for execution. It is immaterial in this connection whether notice was issued to the judgment-debtor of the application for transfer by the original court under the rules of the court or otherwise. Cf. *Chutterput Singh* v. *Sait Sumari Mull* (11) and *Narain Das Dutt* v. *B. B. Chattopadhya* (1). This view of their Lordships gives full effect to the provisions of the Code under which it is the decree that is transferred to another court for execution and it is a matter for the executing court which is the latter court, to decide whether execution of the decree is barred or not. In giving effect to this view their Lordships have approved of the Full Bench decision of the Calcutta High Court in *Chutterput Singh* v. *Sait Sumari Mull* (11) which has not been followed by the Madras High Court in *Rajitagiripathi* v. *Bhawani Sankaram* (12). After this pronouncement of the Privy Council, this decision of the Madras High Court and the decision in *Muthuveeraswami Nayudu* v. *Annamalai Chettiar* (13) in so far as it relates to the power of the original court to decide such a question would seem to require reconsideration. The question however whether the court which passed the decree should decide as to who is the proper legal representative of the judgment-debtor may stand on a different footing by reason of the express provision in S. 50 of the Civil Procedure Code. and the decision in *Muthuveeraswami Nayudu* v. *Annamalai Chettiar* (13) on this point may not be affected by the case under notice.

KHETRA MOHAN SAHA *v.* JAMINI KANTA DEWAN, (1927) I L R 54 Cal. 445.

In this case a document attested by witnesses which was clearly a promissory note did not say in terms that the amount of it was payable to the order of the payee but it was none the less so payable under Explanation 1 to S. 13 of the Negotiable Instruments Act by which in the absence of words of any prohibition, a promissory note payable to the payee was also payable to his order and the question was whether it was a bond within the terms of S. 2 (5) (*b*) of the Indian Stamp Act and the learned Judges have answered it in the affirmative. A similar view was taken by the Judicial Commissioner of

1. (1924) 78 I C 1001. 11. (1916) I L R 43 C 903 (F B).
12. (1924) I L R 47 M 641 : 47 M L J 4.
13. (1926) M W N 120.

Nagpur in *D. Rozario* v. *Hariballabh Onkarjee Trivedi* (1) but this case is of no authority as the difficulty has not been noticed with reference to the explanation referred to above. The point therefore is really one of first impression and we are not sure whether as much cannot be said for the opposite view as for the one which found acceptance by the learned Judges. It may at once be conceded that a promissory note does not cease to be one or become a bond merely because it is attested by witnesses. See *Reference under Stamp Act, S.* 46 (2). To fall within the definition of a bond in the Indian Stamp Act, the instrument needs a further requisite, *i. e.,* that it should not be payable to order or bearer. In the absence of anything in the language of S. 2 (5) (*b*) of the Indian Stamp Act restricting it to the apparent tenour of the instrument, there does not seem to be anything to so understand it and hold that though an instrument is payable to order under the law as under S. 13, Explanation (1) of the Negotiable Instruments Act, it is still one not payable to order under S. 2 (5) (*b*) of the Indian Stamp Act and is a bond within the definition of the latter Act. The decision of the learned Judges would have been quite clear if the Indian Stamp Act had excluded from its definition of a bond only those which contain the words "order or bearer" on their face. The decision of the learned Judges has perhaps this advantage, that instruments of this nature will be admissible on the payment of a penalty under S. 35 of the Stamp Act which will not be the case if they are treated only as promissory notes within the meaning of the Act. If a document falls both within the definition of a promissory note and a bond in the Indian Stamp Act, it will have to bear the higher stamp duty under S. 6 of the Act as a bond and the prohibition regarding its admissibility in evidence as a promissory note may thus be removed.

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1. (1927) 100 I C 794. 2. (1884) I L R 8 M 87 (F B).

DURGA CHARAN CHANDRA *v.* AMBIKA CHARAN CHANDRA, (1927) I L R 54 Cal. 424.

In this case, a puisne mortgagee with a view to avert a sale of the mortgaged properties in execution of a decree on a prior mortgage paid off the decree amount and sued to recover the amount personally from the mortgagor without bringing a suit on the prior mortgage and the question was therefore whether a puisne mortgagee's right under the circumstances was exclusively one under S. 74 of the Transfer of Property Act by being subrogated to the rights of the prior mortgagee whom he paid off or whether he has a cumulative right under S. 69 of the Indian Contract Act for the reimbursement of the amount. The learned Judges have answered the question in the latter alternative, though one of them has done so with some hesitancy. That the right conferred by S. 69 of the Indian Contract Act has not been excluded by S. 74 of the Transfer of Property Act has been the view of the Patna and the Allahabad High Courts in *Sibanand Misra* v. *Jagmohan Lall* (1) and *Shib Lal* v. *Munni Lal* (2). We venture to think that it is the latter case which is referred to in the report of the decision under review perhaps by a mistake of the reporter as *Sheo Saran Chandri* v. *Ram Lagan Das* (3). The Patna High Court in the case referred to above has differed from the Allahabad decision on the question of limitation for enforcing the mortgage right acquired by subrogation but has adopted the portion of the decision relating to the remedy under S. 69 of the Contract Act being cumulative. The decision has now the authority of at least three High Courts and there is none to the contrary, so far as we are aware.

In the course of his judgment, Mr. Justice Mukerji has observed that if the prior mortgage which is paid off does not contain a personal covenant, the provisions of S. 69 can not be invoked as in the learned Judge's view, the mortgagor will not in that case be bound to pay the amount within the meaning of the section. We are not sure that in observing that the section requires a pre-existing personal liability, the learned Judge had regard to the illustration to the section itself which is a case where only the property was liable as under a charge and there was no personal liability. Besides there are decisions in the Calcutta High Court itself to the effect that the section does not

1. (1922) 1 Pat. 780.
2. (1921) I L R 44 A 67.
3. (1921) I L R 44 A 64.

require a personal liability and that it is sufficient if it is with reference to property alone. Reference may be made in this connection to the case of *Mothooranath Chuttopadhya* v. *Kristokumar Ghose* (4) which has been followed in *Chandradaya* v. *Bhagaban* (5) and *Sarajubala* v. *Kamini Kumar* (6) the last being a case to which, we believe the learned Judge was himself a party.

In this connection, it must be observed that the rules of law in England and India as to the rights of a mortgagee who with a view to protect his interests makes some necessary payments, are not similar. In England, in such a case, the mortgagee would only be entitled to add the amounts to the mortgage money and cannot sue for the same as on a debt. See *Ex parte Fowings In re Sneyed* (7) and the other cases which have been referred to in Dr. Ghose on Mortgages, 4th edition, at pp. 558, 559. The law in this country has been held to be otherwise as pointed by Mukerji, J., in the present case. It is possible that it is the view of the law held in England that led Mr. Justice Graham to entertain the doubts he did on the main question.

DARBARI LAL *v.* MAHBUBALI MIAN, (1927) I L R 49 All. 640.

In this case we have a somewhat extended application of S. 140, Indian Contract Act. That section says that the surety is entitled to all the rights which the creditor has against the principal debtor upon payment or performance of all that he is liable for. Here no doubt the surety had not paid up the whole amount. But the whole amount was subsequently paid up by the principal debtor with the assistance of a third party who himself took no assignment of the security from the creditor. By the payment by the principal debtor the whole claim of the creditor is satisfied. Then why should not the surety be entitled to claim the right to the securities, along with the stranger it may be? The stranger's right is only an equitable right and why should it be pitched higher than that of the surety?

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4. (1878) I L R 4 C 369. 5. (1915) 23 C L J 125.
6. (1925) 43 C L J 142. 7. (1883) 25 Ch. D 338 at p. 352.

ULFAT BIBI *v.* BAFATI, (1927) I L R 49 All. 773.

Having regard to the decision of the Privy Council in *Besant* v. *Narayaniah* (1) that a suit does not lie for the custody of children and the remedy if any has to be sought for within the Guardian and Wards Act (*Sathi* v. *Ramandi Pandaram*) (2) Courts have been disposed to take a "merciful" view of S. 25 of the Act and apply the section even though the child was not at any time in the *actual* custody of the guardian (See *Ibrahim Nachi* v. *Ibrahim Sahib* (3). The definition of the word "guardian" in S. 4 of the Act makes it perfectly clear that the term is not confined to guardians appointed or declared by the Court but includes natural guardians. Especially the need for such inclusion can be re-inforced by reference to the fact that S. 19 prohibits the appointment of a guardian for the person of the minor when the father is not unfit to act as such for otherwise, the father cannot recover a child improperly taken out of his custody.

JAVITRI *v.* GENDAN SINGH, (1927) I L R 49 All. 779.

It is difficult to perceive the significance of the remark in the judgment at page 787, of the report that Mussamat Javitri left no daughters but only sons. Even if there were daughters they could not have taken the property—it being now established that property inherited is not stridhan. In this case, Javitri's right to the property was that as an heir to her grandmother and as such she could form no stock of descent and whatever the right of the daughter of the daughter's daughter as Bandhu of the husband (the Allahabad view is against such right), she would have had no right to come in as a descendant of the lady whose stridhana the property was. Nor is the ultimate conclusion that the daughter's son's son is nearer than the daughter's daughter's son so obvious as in point of degrees both are equally related and in point of spiritual efficacy, neither of them would seem to offer a pinda. The subject is enveloped in great doubt, thanks to the confusion introduced by the Privy Council by its recent pronouncements.

Nor is the case quite clear on the point of construction; there was the word "malik" and a further clause that the donor

1. (1914) I L R 38 M 807 : L R 41 I A 314 : 27 M L J 30 (P C).
2. (1919) I L R 42 M 647 : 37 M L J 93 (F B).
3. (1915) I L R 39 M 608 : 30 M L J 21.

and his heirs shall have no more claim in respect of the property coupled no doubt with a restriction as to alienation. If the grant were a modern grant, agreeably to the more liberal view now prevalant as regards such grants, the more correct construction would have been to view it as an absolute grant disregarding the subsequent clause restraining alienation as a repugnant clause. The document in this case was dated 1869 and the Court apparently felt justified having regard to the views then prevalant in putting a narrower construction.

A further question was as to the burden of proof that is to say as to the onus lying on a person claiming as reversioner to allege and to prove the non-existence of a nearer relation. Their Lordships say that the onus is only to satisfy the court that to the best of his knowledge there are no nearer heirs and that it is for those who allege the contrary to prove if they can, the existence of nearer heirs, *Rama Row* v. *Kuttiya Goundan* (1). The observations were not quite necessary for the decision as there was in fact evidence that the plaintiffs were the nearest in the depositions of the defendant's witnesses themselves. In the view that the grant was an absolute grant, plaintiff had no title when he brought the suit but as the daughter's daughter died pending the appeal, the court felt justified in Second Appeal in confirming the decree given to the plaintiff. Here, the plaintiff had no right at the time of the suit to the property and we should think that it is a rather violent exercise of the power of amendment possessed by courts though there are some precedents in support of the course adopted.

MOHAN LAL *v.* KALI CHARAN, (1927) I L R 49 All. 788.

Even under the old Code, in which there was no provision for notice of the settlement of proclamation of sale, the Privy Council held in *Arunachalam* v. *Arunachalam* (2) that a judgment-debtor who was aware of the insufficient description in the sale proclamation and did not object could not afterwards take advantage of the defect and make it a ground for setting aside the sale. That ruling would *a fortiori* apply to sales under the present code where specific provision is made for notice.

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1. (1916) I L R 40 M 654 : 30 M L J 514.
2. (1888) I L R 12 M 19.

PHUL SINGH *v.* BHOJRAJ, (1927) I L R 49 All. 801.

In this case, there is a discrepancy between the facts as stated in the head-note and the facts as appear in the judgment. On the facts as stated in the head-note the point is obvious *viz.*, that where there is a reference by members of the family authorising the arbitrator to apportion the liability in question between members of the family, that amounts to an acknowledgment. The facts as appearing in the judgment are that both the liability of the family and the question of apportionment was left to the arbitrator. That would give an altogether different complexion to the case. The parties make no admission of liability and make no promise to pay what the arbitrator might decide to be due. The arbitrator is only in the position of a judge. His decision would be binding on the parties to the reference but he is not a person who is authorised to make an acknowledgment on behalf of the party. The award furnishes a cause of action but that is apart from any volition or admission of the party referring and is available only to parties to the reference. On a somewhat similar line of reasoning it was held in *Krishna Reddi* v. *Thambu Reddi* (1) that the finding of the arbitrator on a reference by members of a Hindu family with a view to partition, that a debt was binding on them was no evidence at all in favour of the creditor who was not a party to the reference.

BANSIDHAR *v.* SAMPAT KUMAR SINGH, (1927) I L R 49 All. 806 (F. B.)

In this case, the hearing was postponed with a view to impending legislation to nullify the effect of the Privy Council decision in *Dayal Singh* v. *Indar Singh* (2) as to the necessity of registration for agreements for sale of land reciting receipt of consideration of more than Rs. 100 and as the amendment purports to be *retrospective* in that such a document "shall not be deemed to require or even to have required registration", the case had the benefit of the legislation.

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1. (1902) I L R 26 M 28. 2. (1926) 24 A L J 807.

SIKANDAR KHAN *v.* BALAND KHAN, (1927) I L R 8 Lah 617.

This judgment gives very cogent reasons for holding that the right of appeal now expressly conferred under O.43, R. 1, cl. (*w*) of the Civil Procedure Code against an order granting a review is defined and controlled by the provisions of O. 47, R. 7 corresponding to the old S. 629. Any other construction will render O. 47, R. 7 absolutely superfluous and such a view is obviously against the well-established rules of construction relating to interpretation of statutes. The decision of the Bombay High Court in the contrary sense in *Dass* v. *Karbasappa* (1) is rightly dissented from as being opposed to both principle and authority. The apparent conflict between the two rules is properly reconciled by holding that the right of appeal conferred under the earlier rule is regulated by defining its extent and ambit under the latter rule.

MAUNG PO GYI *v.* MAUNG MIN DIN, (1927) I. L. R. 5 Rang. 561.

The decision of the Privy Council in *Hira Bibi* v. *Ram Hari Lall* (2) must be taken to have definitely established that the rule as to attestation of a mortgage deed laid down by S. 59 of the Transfer of Property Act is one affecting the validity of the instrument and is not merely a rule of evidence affecting the proof of the document. This rule is in no sense affected by the recent amendment to the Transfer of Property Act defining the meaning of the word "attested" (Act XXVII of 1926). A mere admission of execution of the mortgage-deed by the mortgagor will not dispense with the necessity of proving that the document is duly attested, where there is a denial of the validity of the document in the written statement, as S. 70 of the Evidence Act can only apply in the case of a document either admitted or proved to be duly attested. There can be no question therefore of the invalidity of a document which bears on its face an attestation by only one person as in the case under notice. As the mortgage-deed was on the face of it invalid for want of attestation by two witnesses at least it was rightly held that a mere admission by the mortgagor that he executed the document was not a sufficient legal basis for upholding the mortgage.

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1. (1925) I L R 27 B L R 1446.
2. (1925) I L R 5 Pat. 58 : 49 M L J 240 (P C).

BHAGWAN DAT SHASTRI *v.* RAJA RAM, I. L. R. 49 All. 705.

This is a curious decision. It was held that the promise to pay 1|10th of the decree money to a man who was to perform a *pooja* for securing success in the suit was against public policy and was unenforceable. The ground of the decision is that the intention of the parties was that the plaintiff should exercise some influence unauthorised by law on the mind of the Court. One might, according as his temperament leads him, regard all prayer as superstition and as incapable of bringing about the object. In that view, such an agreement would be one vitiated by impossibility. It is difficult to appreciate why in a case where the righteousness of the claim of the plaintiff is vindicated by the decree, the intention of the parties should be regarded as one of a sinister kind. Possibly, the fact that the agreement was to pay a certain proportion of the decree amount had considerable part in inducing the conclusion.

BAZ BAHADUR SINGH *v.* RAGHUBIR PRASAD, I. L. R. 49 All. 707.

In the body of a mortgage document, it was recited that a portion of the consideration money was received before the Registering Officer but his endorsement showed that a lesser amount had been paid before him. Mr. Justice Mukherjee, rightly we think, regards the case as one of not even an admission—as the statement recited only an expectation and this expectation was belied by the registrar's endorsement. What the lower court did in the case was to treat the recital as an admission so far as receipt of money went disregarding the further statement that it was received at the registration. Mr. Justice Ashworth takes exception to this course and finds fault with the cutting up of the admission in this fashion. There is a rule that an admission in pleadings should not be cut up in that fashion but we are not aware of any rule similarly restricting the Court in its appreciation of evidence—though it is bound to admit in evidence the whole of the statement and ordinarily would not cut up the admission in that manner in the absence of other evidence as to payment.

ABDUL GHANI *v.* CHIRANJI LAL, I. L. R. 49 All. 726.

In this case, Mr. Justice Mukherjee holds that the extra period within which a suit can be filed having regard to S. 4 of the Limitation Act is a part of the period prescribed and an acknowledgment during the period is sufficient to save limita-

tion. The contrary view taken in *Bai Hemkore* v. *Masamalli* (1) has not been adhered to in the Bombay Court itself. The period of extra two years under S. 31 has been held to be time prescribed within the meaning of S. 4, but curiously enough S. 4 regards the period as outside "the period prescribed", the language used in S. 19.

In re : THE UNION INDIAN SUGAR MILLS CO., LTD. *v.* BRAIJ LAL JAGANNATH, I. L. R. 49 All. 728.

It is settled bankruptcy law that the official assignee is not bound by the judgment against the insolvent, or, any admission or covenant by him. If the Court has reason to doubt their *bona fides*, it has power to go behind them. In the case of judgments the Court need not be satisfied that they were procured by fraud or collusion as in the case of parties and their representatives.

RAGHUNATH PRASAD SAHU *v.* MUSSAMUT RAMPIARI KUER, I. L. R. 6 Pat. 687.

There is nothing in O. 44, Rules 1 and 2, which requires that the Court should make the inquiry into the pauperism of the appellant only after it decides that the proposed appeal is otherwise competent. Where the Court orders notice on the question of pauperism without in any way deciding whether the decree is contrary to law or some usage or otherwise erroneous or unjust, it would be wrong to hold that the court cannot go into that matter later on. The decision in *Mussamat Bachan Dai* v. *Jugal Kishore* (2) was really a case where at an earlier stage the court had decided that the appeal was otherwise competent, the proviso to O. 44, R. 1, being satisfied, and allowed the application subject to proof of pauperism. Even in the present decision the head-note does not seem to be correct as the judgment proceeds on other considerations and the proposition extracted in the head-note was really obiter.

BIGAN SINGH *v.* KING EMPEROR, I. L. R. 6 Pat. 691.

After the pronouncement of the Privy Council in *Abdul Rahiman* v. *King-Emperor* (3) it cannot be taken that every disobedience to an express provision of law as to the mode of a criminal trial is an illegality which cannot be cured under S. 537 of the Criminal Procedure Code. The authority of the decision

1. (1902) I L R 26 B 782. 2. (1924) 8 Pat. L T 119.
3. (1926) L R 54 I A 96 : I L R 5 R 53 : 52 M L J 585 (P C).

in *N. A. Subramania Aiyar* v. *King-Emperor* (4) is considerably weakened by the explanation of their Lordships of the precise scope and effect of the earlier case in the later decision. While it is true that no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused, the courts will still have to decide on the applicability of S. 537 with reference to the object and scope of the provision of law which is disobeyed. In the particular case, the examination-in-chief of one of the prosecution witnesses recorded on a previous day was read out again in the presence of the accused and the vakil who acquiesced in the course was allowed to cross-examine. No prejudice was alleged or proved. In the circumstances the court may well have held that the irregularity was cured by S. 537 and that the trial was not a nullity.

SOMAR SINGH *v.* DEONANDAN PRASAD SINGH : I. L. R. 6 Pat. 781.

While an application under O. 34, R. 5, Civil Procedure Code, for obtaining a final decree in a mortgage suit will be governed by Article 181 of the Limitation Act, 1908, there can be no doubt that applications to enforce the final decree are all execution applications which will be governed by Article 182.

On the second point decided in the case, the language of Article 182, cl. (2) may be susceptible of the construction adopted by the Judges but there will be no real difficulty in such cases, as the party can apply for a fresh final decree within three years of the date of disposal of the appeal against the preliminary decree. The application for execution of the final decree obtained in pursuance of the preliminary decree of the first court may easily have been amended into one for passing a fresh final decree in pursuance of the appellate judgment and for execution of the same. There can be no objection to such a course as the applications will be in time both under Article 181 and Article 182.

PAHLAD RAI *v.* SHIV RAM : I. L. R. 8 Lah. 681.

The meaning of the word 'judgment' in the clause of the Letters Patent allowing an appeal from the decision of a single Judge of the High Court has been the subject of conflicting decisions and there are now Full Bench judgments in the various High Courts which lay down the general test. Still there is a considerable conflict of decisions with regard to

4. (1901) L R 28 I A 257 : I L R 25 M 61 : 11 M L J 233 (P C).

various particular orders. An order transferring a particular case from one court to another has been held by the Madras High Court in *Krishna Reddy* v. *Thanikachala Mudali* (1) to be a 'judgment' while the contrary view is held in Calcutta. [See *Khatisan* v. *Sonairam* (2).] A refusal to transfer however stands on a different footing and the Lahore Court holds in the above decision that it is not a 'judgment' as the effect of the order is not to put an end to the suit in the court in which it is pending. A recent decision of the High Court of Madras also takes the same view—*Narasa Reddi* v. *Mahomed Ayoob Sait* (3).

MUHAMMAD ISMAIL *v.* THE CROWN, I L R 8 Lah. 647.

S. 197 of the Criminal Procedure Code which requires a previous sanction of the Local Government as a condition precedent to a Criminal Court taking cognisance of certain classes of offences by some public servants has always been difficult of application to concrete cases and the various changes in the phraseology of the section in the successive codes has not yet cleared the difficulty which the Courts have experienced in defining the class of offences which come under the purview of the section. As pointed out by the Madras High Court in a recent judgment, *Kamisetti Raja Rao* v. *Ramasami* (4), even the latest amendment made in 1923 still causes difficulty and the change of language suggested by Justice Jackson in the above judgment is certainly an improvement which will bring out clearly the obvious intention of the legislature. The essence of the matter is certainly this: "It is no part of the British policy to set an official above the common law. If he commits a common offence, he has no peculiar privilege, but if one of his official actions is alleged to be an offence then in certain cases and in the case of certain public servants, a previous sanction is essential." Judged by this test the decision under notice rightly holds that S. 197 had no application to the facts of the particular complaint as laid. In this connection the observations in *Sheik Abdur Kadir Saheb* v. *Emperor* (5) will be found to be noteworthy.

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1. (1923) I L R 47 M 133 : 45 M L J 153. 2. (1920) I L R 47 C 1104.
3. (1927) 27 L W 163. 4. (1927) I L R 50 M 754 : 52 M L J 647.
5. (1916) 1 M W. N 384.

CHANDI PRASAD *v.* JUMNA : I. L. R. 49 All. 830 :

The judgment-debtor died in this case after order for sale but before notice for sale proclamation was issued and no notice was issued to the judgment-debtor's representatives. The question was as to the effect of such omission on the sale which took place. Their Lordships held that the sale was wholly void. The argument, it must be confessed, is not convincing. It is one thing if it is said that S. 50, Civil Procedure Code, contemplates an application for execution in all cases of death of the judgment-debtor, whatever the stage at which the death might take place, or that the process of substitution of legal representative contemplated in O. 22, being unknown to execution [See *Hope P. & Co.* v. *Hamel and Harley, Ltd.* (1)], a fresh application for execution is to be put in in all cases, for, in that case, O. 21, R. 22, would require notice to the legal representatives and a sale in the absence of such a notice would be wholly void. *Rajagopala Aiyar* v. *Ramanujachariar* (2). But if that view is not accepted as apparently their Lordships held in this case, then the sale is bad only on the ground of want of notice under O. 21, R. 66. It is difficult to see why want of notice under that section should be regarded as more than an irregularity. We should think that absence of notice under O. 21, R. 66, is but an irregularity coming within O. 21, R. 90. At any rate we have the authority of the Privy Council that misrepresentation as to value is only an irregularity in the publication and conduct of sale. In *Krishna Pershad Singh* v. *Moti Chand* (3), their Lordships of the Privy Council deal with absence of notice of attachment and subsequent proceedings to the legal representative as material irregularity within S. 311, Civil Procedure Code (old Code). In *Jagan Nath* v. *Daud* (4) and *Neely Neithiar* v. *Subramania Moothan* (5), absence of notice has been held only an irregularity; in the former as an irregularity within O. 21, R. 90, in the latter as not falling within that rule but still only an irregularity not vitiating a sale without proof of substantial injury. [See *Bipin Behari Bejali* v. *Kanti Chandra Mandal* (6), contra *Ramaswami Chetty* v. *Ma-U-Tha* (7).] There is another principle apart from that involved in the necessity for notice

1. (1925) I L R 49 M 1 (P C).
2. (1923) I L R 47 M 288 : 46 M L J 104 (F B).
3. (1913) L R 40 I A 140 : I L R 40 C 635 : 25 M L J 149 (P C).
4. (1923) I L R 4 Lah. 243.
5. (1919) 11 L W 59.
6. (1913) 18 I C 715.
7. (1916) 11 Bur. L T 40.

under O. 21, R. 66, or O. 21, R. 22, which has been recognised in various cases, *viz.*, that the property of a dead man cannot be sold without the representatives on record—the steps taken already such as attachment etc., being however available as against the representative [*Rajagopala Aiyar* v. *Ramanujachari* (2), *Krishnayya* v. *Unnissa Begam* (8), *Groves* v. *The Administrator-General.* (9) *Ragunatha Swami Aiyangar* v. *Gopala Rao* (10), contra *Doraswami* v. *Chidambaram Pillai* (11)]. In that view, the sale would be bad.

MADHURI SARAN *v.* BISHAMBHAR NATH : I. L. R. 49 All. 839.

In this case, the Court refused to take a technical view of the matter and held that a deposit of a part by one judgment-debtor and of the balance by another under O. 21, R. 89, may be treated as the deposit of the whole by them both so as to enable the Court to set aside the sale.

SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* BHAGWAN DAS AND B. N. W. RAILWAY, I. L. R. 49 All. 889.

It is very much to be regretted that in cases dealing with construction of documents, cases should be reported without the terms of the document being fully set out. The whole thing turns on the exact words used, but we do not have the words. So far as one could gather from the facts as they appear from the judgment, the questions in the case were—whether non-delivery is included in the word "loss" and, even if it did, whether non-delivery of part of a load was so included and finally whether, when on the facts appearing or admitted by the defendant company inference of misconduct could be shown to arise, it was necessary for the plaintiff to give specific evidence as to the misconduct of defendant's servants. Their Lordships held on the first two questions in the affirmative and on the last in the negative. On the second question, Mr. Justice Daniels had held in *Secretary of State for India* v. *U. P. Glass Works* (1) differently. Their Lordships disapprove of that decision.

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1. (1926) I L R 48 A 584.

2. (1923) I L R 47 M 288 at 306 : 46 M L J 104 (F B).

8. (1891) I L R 15 M 399. 9. (1898) I L R 22 M 119 : 8 M L J 288.

10. (1921) 41 M L J 547.

11. (1923) I L R 47 M 63 : 45 M L J 413.

DEBI DAS *v.* MAHARAJ RUP CHAND : I L R 49 All. 903.

Although it might be open to argument whether an order rejecting the claim of a mortgagee not in possession on an attachment to have his mortgage recognised would amount to an order under S. 282 (corresponding to O. 21, R. 62), as that section only gave the Court a discretion "to continue the attachment, subject to such charge" and said nothing about rejecting the claim, as S. 281 (corresponding to O. 21, R. 61) did, and consequently whether S. 283, which makes only orders passed under S. 280, S. 281 or S. 282 conclusive, would apply to a case of disallowance of the claim of the mortgagee, there could be no question that under the present Code, which makes any order made against the party conclusive, it would be so apart from the question whether it is under O. 21, R. 60, R. 61 or R. 62. We agree, however, with the learned Judges of the Allahabad High Court in the present case that, even under the old Code, there is no reason why such an order should not come under S. 280 (O. 21, R. 60), or S. 282 (O. 21, R. 62). An order refusing to release an attachment or refusing to recognise a claim of the mortgagee, is as much an order under either of the sections as one recognising it. A somewhat similar question arose in *Venkatasami* v. *Stridavamma* (1), *viz.*, whether an order declining to appoint a receiver was an order passed under S. 503 within the meaning of S. 588, as the former section only said that the court may appoint a receiver in specified circumstances. Their Lordships held that it was an order under S. 503 and therefore an appeal lay. In *Suppi* v. *Kunhi Koya* (2) it was held that an appeal lay from an order, refusing to punish a man for breach of an injunction under O. 39, R. 2 (3), under O. 43, R. 1 (*r*), though the former rule says that "the Court may order ...." and the latter rule provides only for an appeal against an order under O. 39, R. 2. *Durga Prasad* v. *Mansa Ram* (3) and *Ganesh Krishna* v. *Damoo* (4) holding to the contrary were both passed under the Code of 1882 and were therefore distinguishable though the learned Judges disapprove of the reasoning in those cases.

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1. (1886) I L R 10 M 179 (F B).
2. (1916) I L R 39 M 907 : 30 M L J 523 (F B).
3. (1904) 1 A L J 531. 4. (1916) I L R 41 B 64.

EMPEROR *v.* BALU RAM. I. L. R. 49 All. 913.

"What is gambling in a public place?" was the question in this case. As rightly observed by Mr. Justice Sulaiman a place would not be a public place unless the public had by right, permission or usage or otherwise access, not necessarily generally, it may be even on the particular occasion in question, and the mere fact that it is open to public gaze from the public street would not make the place a public place. As said in *Emperor* v. *Sukhnandan Singh* (1), the permission to the public need not be express; if they are not refused entrance that may be sufficient.

BANMARI LAL *v.* NAND RAM, I L R 49 All. 923.

Where the mortgagee omits to make the transferee of a part of the mortgaged property party to his suit and sells the property and purchases it himself, can he, after the period of limitation for his suit for sale has expired, call upon the transferee to redeem him, was the question their Lordships had to consider in this case. Whether that is the right kind of decree to pass or whether a decree for sale is the right decree to make, there is a considerable amount of conflict between courts and between the various decisions of the same court, some holding that a second suit for sale is the only remedy while others hold that the mortgagee has the right to call upon the latter to redeem him (the question having mainly arisen in the case of prior and puisne mortgagees). But there could be no question we think that either right can be exercised only if the right to sell is subsisting, the right to call upon the defendant being ancillary to such right of sale and incapable of standing without it. Whether such a mortgagee in the position of a defendant would be in a better position is again a matter for difference of opinion. Where as a mortgagee he is not entitled to possession it is difficult to find a legal basis for such advantageous position. A simple mortgagee, finding himself in possession might possibly be liable to account under S. 76, Transfer of Property Act, but that he should, thereby, become changed into a usufructuary mortgagee would seem to be an impossible process of transmutation.

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(1) (1921) I L R 44 A 265.

MAHARAJA OF PITHAPURAM *v.* RAMA RAO, I. L. R. 50 Mad. 770 : 53 M. L. J. 329.

In spite of the Full Bench judgment in *Tulja Ram Row* v. *Alagappa Chettiar* (1), the question as to what is a judgment and what is not within the meaning of cl. 15 of the Letters Patent, is still a matter of great doubt in the Madras High Court itself, not to speak of the divergence between the various High Courts. The test adopted by the majority in *Tulja Ram Row* v. *Alagappa Chettiar* (1) (Mr. Justice Ayling gives no reasons) is, not whether a particular judgment involves the exercise of a discretion or not, not whether it is an adjudication on the rights of the parties or not, nor again whether it is interlocutory or final, but whether the proceeding would or would not terminate the suit or proceeding before the court, except in the case of subsidiary or ancillary proceedings like application for injunction, arrest or receiver, where the order, whichever way it might go, would be a judgment. It is not quite clear from the judgment as regards the first part of the rule whether according to their Lordships the adjudication or the nature of the proceeding is the material point or the proceeding actually terminating the suit is the material point. But the various illustrations given would seem to show that the former is the test. Their Lordships approve of the judgment in *Vaghoji* v. *Camaji* (2), where it was held that an appeal lay from an order dismissing a Judge's summons to show cause why leave granted under cl. 12 of the Letters Patent should not be rescinded, and the judgment in *Howard* v. *Wilson* (3), where an order refusing to confirm an award made in the course of a suit was held to be appealable, which shows that the order need not have the effect of terminating the suit but the proceeding must be such as to terminate the suit if it is one taken in connection with a suit or it must be a proceeding preliminary to a suit like an application for leave to sue in *forma pauperis* or an application after termination of suit like a review proceeding. Acting on that view, their Lordships hold in this case that an order rejecting an application to rescind the leave granted under cl. 12 is appealable, but add a rider possibly justified by the circumstances of the case, *viz.*, that in this case the leave to sue was not objected on the ground that on the facts, leave should not have been given but that, in the

1. (1910) I L R 35 M 1 : 21 M L J 1 (F B).
2. (1904) I L R 29 Bom. 249.
3. (1878) I L R 4 C 231.

case, the court had no jurisdiction to give leave. Their Lordships thought the lower court had not finally decided the question but had merely postponed decision or at best had given only a sort of tentative decision. On that sort of tentative decision, the court could not of course rescind the leave given. In deciding the question of leave, the court has two questions to decide; first, whether at all it is a case in which leave could be given, secondly, whether, assuming the court had jurisdiction, leave should be given. On the second ground, the leave given was not impeached. On the first according to their Lordships there was no final decision. One should have thought, the court having rejected the application for rescinding leave on the view that a tentative decision on the question of jurisdiction would suffice, there was a final disposal of the application relating to leave and an appeal lay from the order, though the only order that could be passed was the order directing the lower court to determine the question finally. Finality of the decision on the subsidiary questions that arise would not seem to be an essential requisite according to the Full Bench decision above referred to. Insistence on it would seem to be a refinement engrafted by this decision on the rule laid down in that case.

THE OFFICIAL ASSIGNEE OF BOMBAY *v.* OBLA KUNA MUNA SUNDARACHARI, I L R 50 Mad. 776 : 53 M L J 209.

Cases have laid down that transactions bad under Ss. 53 and 54 of the Provincial Insolvency Act of 1920 or the corresponding sections of the Provincial Insolvency Act, 1907, are not void as such but have got to be set aside by the Insolvency Court on proceedings taken under the sections and cannot be got rid of by regular suit in ordinary courts or be impeached collaterally by the Official Assignee by way of defence. *Mariappa Pillai* v. *Raman Chettiar* (1) and *The Official Receiver, Coimbatore* v. *Palanisami Chetti* (2). A distinction was sought to be made in this case between the Provincial Insolvency Act and the Presidency Towns Insolvency Act. It is the bane of Indian Legislation that it is never consistent except in its embarrassing inconsistency in language. Instead of adopting the language of English Statutes which have had long judi-

1. (1918) I L R 42 M 322.
2. (1925) I L R 48 M 750 : 49 M L J 203.

cial interpretation or of adopting some consistent phraseology, it adopts one phraseology in the Provincial Insolvency Act and another in the Presidency Towns Insolvency Act. These are not the only matter on which there is such, so far as one could see, wholly purposeless divergence (*vide* sections relating to the effect of *death*, as to the kinds of property vesting, as to annulment on the insolvent failing to apply for discharge among others). The language of the Presidency Towns Insolvency Act is the language of the English Bankruptcy Acts and there is no reason why the same construction as is adopted by English Courts, *viz.*, that it is only voidable should not also be adopted in this country. The Insolvency Court is the tribunal exclusively constituted for the purpose of trying such questions and it should be embarrassing in the extreme to have conflicting judgments of various courts on the same question.

CHOKKALINGAM CHETTIAR *v.* ATHAPPA CHETTIAR, I L R 50 M 800 : 53 M L J 364.

The doctrine of fraud on registration introduced by the Privy Council like the other doctrine about the necessity for the witnesses for attesting to be present at the execution happily abrogated by the legislature serves as a powerful ally to dishonest debtors who, after joining the creditor in perpetrating a fraud on the registration law, seek to make use of it against him. An attempt was made in this case to bring within the rule a case where a small bit of property belonging to the mortgagor was included in a mortgage with a view apparently to have registration in the particular Sub-Registrar's Court, within whose jurisdiction the small bit of land was situate, though it could not be said at the same time that the property was not intended to be security as well as the other land. Their Lordships hold that the case is not within the rulings of the Privy Council relating to fraud on registration law. They say that those rulings will apply to cases (*i*) where there is no such property, (*ii*) where there is such property but does not belong to the mortgagor, (*iii*) where in respect of the property the document was not intended to be operative but was only a blind.

U. TEZA *v.* MA E GYWE AND OTHERS, I L R 5 Rang. 626.

This is a rather curious decision dismissing an action in ejectment brought by a Bhuddist monk against the defendants who sold a house to him. On the ground that under the personal

law of a Bhuddist monk he is incompetent "to engage in any transaction in which silver is used" and that he cannot enter into a transaction of buying and selling. No doubt the texts quoted in the decision from the *Vinaya* lay down the disqualification. But it is far from clear that these texts are not rules of moral obligation. The observations of the Privy Council in *Balwant Singh* v. *Rani Kishori* (1) and in *Balasu Gurulingaswami v. Balusu Ramalakshmamma* (2) as regards the caution required in interpreting books of mixed religion, morility and law are well worth remembering. The argument based on the theory of civil death by entering a holy order is neither conclusive nor convincing. The reference in the ancient books to rules regulating the disposal of the property acquired by a monk by agriculture or trade or by usury seems to suggest a legal recognition of the right of property in such acquisitions by a monk though the action of the party may be morally blameworthy. Even apart from this, there is a degree of vagueness in the texts quoted, as regards the class of transactions which come under the prohibition. Would a case of acquisition of property by seizeure or finding be within the rule? There is a good deal to be said against the view that has been found favour with the learned Judge and we think that the question while not free from difficulty has not been considered in all its aspects.

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1. (1898) L R 25 I A 54 : I L R 20 All 267 (P C).
2. (1899) L R 26 I A 113 : I L R 22 Mad. 398 : 9 M L J 67 (P C).

MUTHIA CHETTIAR *v.* KARUPPAN CHETTI, I. L. R. 50 Mad. 786 : 53 M L J 606.

The authority of counsel to compromise seems to be generally accepted in English Courts though that authority will not extend to compromising matters collateral to the action and there is also considerable doubt as to the extent to which court will interfere when the action of the counsel is against the express instructions of the client. In *Neale* v. *Lennox* (1) the Court of Appeal approved of the statement of Lord Alverstone, C. J., on the law viz., that "counsel appearing for a party in an action is held out as having full authority as to all matters which relate to the conduct of the action and its settlement and further that notwithstanding a limit may have been placed upon the authority of counsel, the party for whom he appears is bound by such settlement, unless the fact that the counsel's apparent authority had been limited was communicated to the other side". The Court of Appeal would seem to admit however that counsel's misapprehension or mistake as to the extent of authority in fact given to him is a ground for setting aside the compromise. That case went on appeal to the House of Lords and there a further distinction was made on which the judgment of the Court of Appeal was reversed, viz., that if something further has got to be done by the Court in pursuance of the arrangement, the court may well refuse to enforce it when it is brought to its notice that the client was not a consenting party to the arrangement. As Lord Macnaughten puts it "I do not think the Court is entirely in the hands of the counsel and bound to give the seal of its authority to any arrangement that the counsel may make when the arrangement itself is not in its opinion a proper one" and in the next place "I do not think that any counsel has authority to compel his client to refer an action which the client desires to try in open court"—that was a case of reference to arbitration.

So far as vakils and pleaders go, the trend of opinion is against authority to compromise or refer to arbitration, though the Calcutta Court is for presuming the existence in fact of such authority in the absence of clear evidence to the contrary.

The point that arose in this case was as to whether concession made by the counsel was a concession as to the subject-matter of the suit or as to a matter collateral to the suit. An agent of a Nattukottai Chetti operating in Singapore and sur-

1. L R (1902) 1 K B 838.

rounding area got a release from the subsequent agent in respect of the principal's claims on the former recognising the latter's right to the various documents taken by him and on certain other terms. In respect of certain mortgages in the name of the agent, it became necessary for the principals to have a transfer from the agent. The agent refused to consent to a decree from the court directing such transfer unless the release was ratified by the principals. Counsel agreed to such a course and expressly admitted that the release was ratified in toto by the principals. The question was whether this admission bound the principals. The argument was that the admission was in respect of a collateral matter and would not bind the principals. Their Lordships held that it was not a collateral matter but one that directly arose in the suit.

S. M. A. R. A. L. FIRM *v.* R. M. M. A. FIRM, I L R 5 Rang. 773.

In view of the conflicting decisions as to whether Act XXVII of 1926 defining the word 'attested' in the Transfer of Property Act, 1882, was retrospective or not, the Legislature passed Act X of 1927, for the express purpose of settling the question by giving retrospective effect to the amended definition. The decision under notice therefore applies the definition of the word "attested" as it now stands to transactions of mortgage executed prior to the Act of 1926. It may, however, be noted that Act X of 1927 is somewhat loosely drafted as S. 4 of the Act seems to nullify the effect of S. 2 thereof with reference to this particular amendment in the schedule. The subsequent re-enactment of the said S. 4 as S. 3 of Act XII of 1927 also contains the identical saving clause. A literal construction of the terms of S. 3 and S. 4 will go to show that the two Acts of 1927 cannot give any retrospective effect to the amended provisions of Act X of 1927. The real intention of the Legislature was merely to give no retrospective effect to the repealing portion of the said Act and not to the amending portion thereof, but the language used seems to be unhappy. The difficulty is mainly due to the Legislature having adopted the curious way of providing for a particular case of an amendment intended to have retrospective effect in a general repealing and amending Act with the usual safeguards.

BUDHA MAL *v.* RALLIA RAM, I L R 9 Lah. 23.

The Lahore High Court has reiterated the view already taken by it in several cases that in respect of suits like one for accounts where in the first instance a tentative valuation is made by the plaintiff, the forum of appeal is determined not by the amount fixed by the plaintiff in his plaint but by the amount found to be really due by the decree under appeal. The decision of the Full Bench of the Madras High Court in *Putta Kamayya Chetti* v. *Rudrabhatta Venkatanarasiah* (1), and the decision of the Allahabad High Court in *Muhammad Abdul Majil* v *Ala Baksh* (2) are specifically dissented from. The conflict of views is now so sharply defined that the matter can be settled by the Legislature only, in the absence of an authoritative pronouncement by the Privy Council.

KHUSHIA *v.* FAIZ MUHAMMAD KHAN, I L R 9 Lah. 33.

While we agree that an unauthorised transfer by an authorised guardian should be set aside within the period of limitation provided for by Art. 44 of the Limitation Act, the judgment under notice seems to require re-consideration as the alienation in question was one made by a person who cannot be described as the lawful guardian of the minor. The plaintiff being a Muhammadan, his mother is not a guardian under the Muhammadan Law. The sale by the mother of immoveable properties belonging to the minor will not therefore be binding on him : see *Imambudi* v. *Mutsaddi* (3). Art. 44 of the Limitation Act has no application to a suit to recover the properties, as such a sale is not effected by a guardian but by a wholly unauthorised person. See *Mata Din* v. *Ahmed Ali* (4). Art. 144 only can apply. It seems to have been admitted before the learned Judges that the mother was the guardian of the property of her minor son. This admission will not be correct unless it be that in the particular case the mother had been appointed executrix under the will of the father of the minor in which case only she could be the guardian under the Muhammadan Law.

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1. (1916) I L R 40 M 1 : 32 M L J 221 (F B).
2. (1925) I L R 47 A 534.
3. (1918) L R 45 I A 73 : I L R 45 C 878 : 35 M L J 422 (P C).
4. (1912) L R 39 I A 49 : I L R 34 A 213 : 23 M L J 6 (P C).

PURAN DAS *v.* EAST INDIAN RAILWAY COMPANY, I L R 6 Pat. 718 (F B).

This was a reference to the Full Bench for the purpose of deciding whether the term "loss" in the risk note Form B under S. 72 of the Railways Act included "non-delivery" to the consignee. There is a sharp conflict of views on the point. See *Great Indian Peninsular Railway Company* v. *Jitan Ram* (1), *East Indian Railway Company* v. *Jagpat Singh* (2). The Full Bench did not decide the point as it took the view that the pleadings in the case proceeded on an admission of loss of the consigned goods. We prefer the view taken by the Calcutta Court that the term "loss" means loss of the goods and not merely loss to the owner caused by the non-delivery of the goods by the Railway. The onus of proving "loss" within the meaning of the risk-note is in the first instance on the Railway Company, which seeks to exempt itself from liability to deliver by reason of the exemptions in the contract. It is true that a party cannot take the case out of the terms of the risk note merely by framing the suit as one for compensation for non-delivery. The question is one of substance and not of form. If the Railway Company can show that the goods are lost in the sense that it has lost possession of the goods involuntarily or through inadvertence and for the time being is unable to trace them, then it is exempt from liability unless the plaintiff proves "wilful neglect, *etc.*," in the terms of the proviso.

It is desirable that a question which arises so frequently should be authoritatively settled and it is regrettable that the Full Bench avoided giving a decisive ruling.

The conflict of views however will not be so embarrassing, as the risk note forms have now been radically altered and the new forms give greater facilities for the consignors of goods to safeguard their interests against the Railway Companies which never err on the side of giving more information as to the facts than what the law compels them to do.

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1. (1923) I L R 2 Pat. 442.
2. (1924) I L R 51 C 615.

FAKIR CHAND MANDAL *v.* DAIBA CHARAN PARNI, I L R 54 Cal. 1052.

The question in this case was whether, where an application for setting aside an *ex parte* decree is dismissed and an appeal against the order is also dismissed by the appellate court, the decree-holder could seek to execute his *ex parte* decree within three years of the order of the appellate court under the second clause of the third column of article 182 of the Indian Limitation Act. The learned Judges have answered the question in the negative and there is a large body of authority in support of the view of the learned Judges commencing from *Sheo Prasad* v. *Anrudh Singh* (1). There is however some difficulty in accepting the reasoning on which the decision under notice is based. The learned Judges have construed the second clause as referring only to cases where the decree or order sought to be executed has been appealed against. It has to be noticed in this connection that while most of the other clauses of the third column refer in terms to the decree or order spoken of in the first column, the second clause is significantly silent in this respect and there seems to be no reason to restrict its operation by reading into it words which are not there. Though there are some observations similar to those in the present case in *Jivaji* v. *Ramchandra* (2), we are not sure that they were necessary for the purpose of that case. Indeed, there is direct authority in the contrary direction in *Narsingh Sewak Singh* v. *Madho Dass* (3) where a decree passed on review was appealed against and the execution of the original decree was held to be in time under the second clause of the third column of article 182, although the decree sought to be executed was not appealed against and the learned Judges distinguished the case of *Sheo Prasad* v. *Anrudh Singh* (1) to which their attention was drawn. Again in a recent decision of the Patna High Court in *Somar Singh* v. *Deonandan Prasad Singh* (4), an appeal was preferred against the preliminary decree and, when the appeal was pending, a final decree was passed by the lower court and the question was whether an application for executing the final decree within three years after the appellate decree dismissing the appeal against the preliminary decree but after three years of the final decree of

1. (1879) I L R 2 A. 273.
2. (1891) I L R 16 B. 123.
3. (1882) I L R 4 A. 274.
4. (1927) I L R 6 Pat. 780.

the first court, against which no appeal had been preferred, was in time; and the learned Judges answered it in the affirmative under the second clause of the third column. These two decisions are in conflict with the view that the learned Judges have expressed in the decision under notice regarding the second clause and have not been considered by them. It is therefore a matter for consideration whether on the proper construction of the second clause it is not applicable to all cases where the appeal reopens the suit or proceeding on which the decree or order sought to be executed is passed and imperils the decree or order in any way. If it is understood in this manner, the decision under notice as well the decisions in *Sheo Prasad* v. *Anrudh Singh* (1) and *Jivaji* v. *Ramchandra* (2) which it follows would stand good as, in each case, the appeal was directed against a collateral proceeding to set aside the *ex parte* decree and did not reopen the suit itself in which the decree sought to be executed was passed, though the result of the appeal might be to imperil the decree. Again, the decisions in *Narsingh Sewak Singh* v. *Madho Dass* (3) and *Somar Singh* v. *Deonandan Prasad Singh* (4) would remain unaffected, as, in these cases, the suit itself was under appeal and the decree sought to be executed was imperilled by the appeal. This is substantially the construction adopted in *Somar Singh* v. *Deonandan Prasad Singh* (4) and would seem to reconcile all the cases on the point.

BALMAKUNDA BISSESWAR LAL *v.* BENGAL NAGPUR RAILWAY CO., LTD., I L R 55 Cal. 26.

The main question in the case was as to the procedure available to a decree-holder in executing a decree for specific movables or for an ascertained amount in default. In the decision under notice, the judgment-debtor expressed his willingness and readiness to deliver the moveables themselves. That in such a case the decree-holder has only his remedy under the procedure prescribed in O. 21, R. 31 of the Code and cannot execute as in the case of a money decree under O. 21, R. 30, seems clear. The same view was also held in *Manavikraman*

1. (1879) I L R 2 A. 273.
2. (1891) I L R 16 B. 123.
3. (1882) I L R 4 A. 274.
4. (1927) I L R 6 Pat. 780.

v. *Moyankutti* (1) which the learned Judges have followed. Otherwise the specific provisions in the rule would be without a purpose. With regard to the objection that, in this view, the provisions of O. 21, R. 30, may to some extent be rendered nugatory, it may be answered that they may be applicable to cases where the decree-holder has the option given to him under the decree for the one or other of the reliefs which is not the case where his right to the money depends on the option of the judgment-debtor. It may also have reference to cases where the specific moveable decreed is not in the possession of the judgment-debtor, in which case, it has been held that the procedure, prescribed in O. 21, R. 31, need not be followed. See *Rajah Pudmanund Singh* v. *Chundi Dat Jha* (2).

On the other question, which the learned Judges have left open, *i.e.*, the question of limitation with regard to the execution of a portion of a decree which has not been appealed against, the matter seems both on principle and authority that, even though a portion of a decree has not been appealed against, when an appeal has been preferred against another portion of the decree, the decree-holder has three years from the date of the appellate decree, even for the unappealed portion, under Clause 2 of the second column of Article 182 of the Limitation Act. The decree is one and entire and cannot be said to be composed of a number of decrees clubbed together. Reference may be made in this connection to explanation (1) of the third column of the Article, where a dictinction has been made with respect to joint decrees. On principle also, an appeal being by way of re-hearing of the suit itself, even in cases, where only a portion of the decree is appealed against, the suit itself is re-heard in appeal though in part. The question has been fully discussed from the juristic point of view in *Krishnamachariar* v. *Mangammal* (3). The view that once found favour with the Calcutta High Court in *Christiana Sens* v. *Benarashi Prosad* (4) that the decree in such a case might be split into and conceived of as a number of decrees, leading to the result that the execution of the non-appealed portion may be barred within three years of the original court's decree and not from the decree of the appellate court, has since been dissented from in *Dewan Abdul Alim* v. *Abdul Hakim* (5). Reference may also be made in this connection to *Pancho Bama* v. *Anand Thakur* (6) and *Tula*

1. (1903) 13 M L J 444.
2. (1896) 1 C W N 170.
3. (1902) I L R 26 M. 91 (F. B.)
4. (1914) 19 C W N 287.
5. (1926) I L R 53 C. 901.
6. (1923) I L R 2 Pat. 712.

Ram v. *Bhup Singh* (7) where the possibility of the appellate court interfering under O. 41, R. 33 of the Civil Procedure Code, is also adverted to. Thus it seems clear that the point raised by the decree-holder that his application for executing the unappealed portion of the decree may be barred by limitation within three years of the original decree is one without substance and the decision of the case would have been the same even if the learned Judges had gone into the question.

MANMATHA NATH GHOSE *v.* LACHMI DEBI, I L R 55 Cal. 96.

We must confess to some difficulty in following the decision of the learned Judges in this case. A preliminary decree was passed in a suit for partition by some of the co-sharers against the others. The decree was *ex parte* in respect of some of the defendants and they applied to set aside the *ex parte* decree and the learned Judges have held that it is sufficient if the plaintiffs alone are made parties to the application to set aside the *ex parte* decree and the appeal therefrom and notice is served on them alone without serving it on the other co-sharer defendants. If this is sufficient under O. 9, R. 14 of the Civil Procedure Code, it is not easy to meet the difficulty raised by the respondent in the case, as to why the legislature should not have used the clearer word "plaintiff" rather than the expression "the opposite party". That the expression "opposite party" used in the rule means any party who would be affected by any possible order setting aside the *ex parte* decree was clearly laid down in *Jatindra Mohan Poddar* v. *Srinath Roy* (8). If that is the correct view and the nature of a suit for partition is as it is well understood and explained by the Privy Council in *Nalini Kanta Lahiri* v. *Sarnamoyi Debya* (9) referred to by the learned Judges, we fail to see why the other co-sharers though they are defendants do not stand on a similar footing to that of the plaintiffs themselves and should not be made parties to and served with the application for setting aside the *ex parte* decree. It would of course be different in the case of those defendants who are not interested in the partition, as for instance, the superior landlord whose presence would not be necessary for the partition of an under tenure.

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7. (1925) I L R 47 A. 913.   8. (1899) I L R 26 C. 267.
9. (1914) L R 41 I A 247 : 27 M L J 76 (P. C.)

TULA RAM SAH *v.* SHYAM LAL SAH : I L R 49 All. 848.

Prima facie, a Hindu residing in a province is governed by the Hindu Law obtaining in that place unless he alleges and proves that he migrated from another place where a different law prevailed. The presumption of the application of Hindu Law is rebutted by proof of usage. But where there is *prima facie* evidence of a usage obtaining among a certain class of people and when a member of such class pleads that he is governed by the Hindu Law, the burden would then lie on him to prove that he forms an exception or that there is no custom. This is what their Lordships lay down in this case. The custom was taken to be proved *prima facie* by a book published under the authority of the Government by Mr. Panna Lal, I.C.S., after an elaborate inquiry into the customs of the people of the place.

SUBBARAYUDU *v.* SECRETARY OF STATE : I L R 50 Mad. 961 : 53 M L J 868.

Two important questions arose in this case. So far as Indian law is concerned, it is settled law that to attract the presumption of crown-ownership of the bed it is not necessary that the stream must be both tidal and navigable. In England to raise the presumption, the river must be both tidal and navigable, so that all discussions in English cases as to the navigability of the river when the river is not tidal do not bear on the question of presumption of crown-ownership of the bed. Though the bed might vest in private owners, nevertheless it might be subject to rights of navigation on the part of the public by long immemorial user. Such rights might be qualified rights, their scope and extent being measured by the user. The fact that rights of navigation are recognised in any particular case in England cannot, therefore, afford guidance on the question as to whether a river can be said to be navigable in India, so as to raise the inference of crown-ownership. The rule is one evolved in India and its limitations are to be sought for in Indian decisions. The Indian decisions have laid down and the Privy Council has accepted the position in *The Secretary of State for India* v. *Maharajah of Burdwan* (1) that a river which is navigable only at certain seasons is not navigable within the meaning of the rule. This seems to be but right seeing that only in the case of navigability throughout the year exclusion of

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1. (1921) L R 48 I A 565 : 42 M L J 61 (P C).

all inference of private ownership can properly be predicated. A stream that is not perennial or is not subject to public user at all times cannot be said to be incapable of private ownership so as to give rise to the necessary inference of crown-ownership. In this case, their Lordships also express the view that use for mere fishing craft does not satisfy the definition of navigation.

The second point involved is one on which there was considerable difference of opinion at one time, but since the *Uralam case, Prasad Rao* v. *Secretary of State for India* (2), opinion has been gradually precipitating in favour of that expressed in this case, *viz.*, that where one half of the stream belongs to a private owner and where he, in exercise of his rights as such riparian owner, uses the water, or, for the matter of that a riparian owner in the exercise of his rights as riparian owner uses the water, no matter to whom the bed belongs, the Government cannot levy water-cess under the Irrigation Cess Act. The extreme view taken in the earlier cases can no longer be sustained in view of the decisions of the Privy Council in *Prasad Rao* v. *Secretary of State for India* (2), *Ambalavana Pandara Sannadhi* v. *The Secretary of State for India* (3) and *The Secretary of State for India in Council* v. *Maharaja of Bobbili* (4).

AKBAR ALI *v.* KING-EMPEROR, I L R 7 Pat. 61 (S B).

Of late, there have been various decisions of the Calcutta and Patna High Courts, in which different and conflicting views have been taken as regards the proper mode of constituting a jury for the trial of criminal cases. The question raised is as regards the correct interpretation of the terms "chosen" and "deficiency of number of persons summoned" in the proviso to S. 276, Criminal Procedure Code. As many as four different interpretations are possible of the relevant sections. See the decision of the Calcutta Full Bench in *Kedar Nath Mahato* v. *Emperor* (1). This decision and the Calcutta Full Bench decision both hold that there is to be no ballot where, owing to a deficiency of the required number of jurors, the court in its discretion proceeds to act under the proviso to S. 276 and constitutes the jury by selecting the additional jurors required from such other persons as may be present in court. The

2. (1917) L R 44 I A 166 : I L R 40 M 886 : 33 M L J 144 (P C).
3. (1917) I L R 40 M 909 (P C).
4. (1919) L R 46 I A 302 : I L R 43 M 529 : 37 M L J 724 (P C).
1. (1927) 47 C L J 43.

word "chosen" in the proviso does not necessarily mean "chosen by lot". The choosing by ballot in open court refers to an earlier stage in the proceedings and there is nothing in the section which authorises or justifies the view that the ballot box is to contain the names of persons other than those who have been summoned to act as jurors. Nor is there anything in the Code or the rules framed by the High Courts to show that there is to be a preliminary roll-call of the summoned jurors to see if they are present. A person summoned to act as juror is bound to come forward only when he is being called to take his place in the jury box, as the result of the ballot, under the terms of S. 277, clause (1). It is only after the ballot fails to supply the required number of jurors that the proviso comes into operation. We agree that the decision in *Bhola Nath Hazra* v. *Emperor* (2) was wrongly decided in so far as it holds that there must be a lot after including the persons selected from the public under the proviso.

DR. R. N. SINGHA *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, I L R 5 Rang. 825.

We agree that the plaintiff was ill-advised in the course which he adopted. A suit will not lie to set aside or modify an assessment made under the Income-tax Act. Where, however, the proceedings are wholly *ultra vires* of the Act, a civil suit will lie. The income that was assessed in this case was admittedly one which was liable to pay the tax. The plaintiff's grievance being merely that he could not be assessed to pay Income-tax on the income, as it belonged according to him to his wife, his obvious and only remedy was to avail himself of the procedure under the Act to have that income excluded from his taxable income. A mere error in describing him as proprietor and not manager of the business from which the income arose, in the notice calling on him to make a return of his taxable income, will not make the proceedings of the Income-tax officer wholly *ultra vires* so as to give him a right of suit in the civil court. The case is not one of want of jurisdiction but of a mere erroneous decision if at all by the Income-tax Officer in the course of proceedings entirely and properly within his jurisdiction as conferred by the Act.

With reference to the second contention raised in the case that S. 69 was *ultra vires* of the Indian Legislature, it is clear

2. (1926) 44 C L J 541.

that S. 32 of the Government of India Act has no application to the present case. The present instance is certainly different from the case which was considered by the Privy Council in *Secretary of State for India* v. *Moment* (1).

MA KIN *v.* MAUNG PO SAIN AND OTHERS, I L R 6 Rang. 1.

This decision is no longer correct so far as it follows the authority of *Maung Po Nyun* v *Ma Saw Tin* (2) in laying down that in the case of a desertion by a Burman husband of his wife the latter will on divorce get a decree forfeiting her husband's share in its entirety in her favour. The Privy Council has decided in *Maung Po Nyun* v. *Ma Saw Tin* (3) that there is no authority or principle for the proposition that, 'because the defendant deserted the plaintiff, she was entitled to divorce with possession of *all* the husband's interest in the property'. The share to which the wife will be entitled in such cases will have to be determined with reference to all the circumstances of the case according to rules of justice, equity and good conscience.

COMMISSIONER OF INCOME-TAX *v. A. R. A. N.* CHETTIAR FIRM, I. L. R. 6 Rang. 21.

Under S. 30, cl. (1), proviso of the Indian Income-tax Act, 1922, no appeal shall lie in respect of an assessment made under Sub-section (4) of S. 23. This does not prevent the Court from deciding whether in a case where an assessment purports to be made under S. 23, cl. (4), the Income-tax authorities were justified in acting under that Sub-section. A reference under S. 66 of the Act will lie to the High Court for the purpose of deciding whether the assessment could legally be made under S. 23, cl. (4), but the High Court will not interfere with the actual assessment if it decides that there was jurisdiction for the income-tax authorities to act under S. 23, cl. (4).

It is of course a question of fact in each particular case whether a return submitted by an assessee without filling in the details as required by the statutory form prescribed by the Act is merely an incomplete return within the meaning of S. 23, cl. (1) or is 'no return' at all as required by the Act. This is a question of substance and not of mere form.

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1. (1912) L R 40 I A 48 : I L R 40 C 391 : 24 M L J 459 (P C).
2. (1925) I L R 3 R 160.
3. (1927) L R 54 I A 403 : I L R 5 R 841 : 53 M L J 425 (P C).

NARAYANAN NAMBUDRI *v.* THEVA AMMA : I. L. R. 51 Mad. 46 : 53 M. L. J. 824 (F. B.)

While on the one side it cannot be said that the position of the Karnavan is that of a trustee or that of the secretary of a corporation who represents the corporation, we nevertheless think that the junior members who are obviously not "parties to the suit" cannot either be regarded as representatives of the parties within the meaning of section 47 merely because they are taken as claiming through parties to the suit by force of explanation VI of Section 11, Civil Procedure Code, for the purposes of that Section. The purchaser of a property from the judgment-debtor after attachment is a representative *qua* that property in respect of questions that arise in respect of that property but not in respect of other properties of his own. Similary a purchaser in execution of a money decree pending a mortgage suit would be *qua* that property a representative, but not in respect of his other properties though the question might relate to execution of the decree. In both these cases the purchaser is not a *representative* but only a representative for limited purposes. Similarly a person bound under Section 11, clause vi. He is a representative for that limited purpose and, so far as that limited purpose is concerned, he may be a representative within the meaning of Section 47. A decree against the Karnavan as such is sought to be executed and a point is sought to be raised by a junior member that the decree has been satisfied or that the amount due under the decree is not as much as alleged by the decree-holder. In respect of these matters, he would be a representative, but, if a further question is raised whether the property is Tarwad property or not, then the question would no longer be one in respect of which he is a representative. The cases which hold that a legal representative is bound to put forward his private title in execution under Section 47 are distinguishable on the ground that the legal representative under the Hindu or Marumakkathayam law is as such no different *persona* from himself in his ordinary capacity, such a distinction not being recognised in those systems unlike in the Roman and the English systems. The point of view we have set forth above is fully elaborated by Mr. Justice Ananthakrishna Aiyar in his judgment and we think, with respect, the distinction pointed out by his Lordship is sound.

N. I. C.

VEERARAGHAVACHARIAR *v.* THE ADVOCATE GENERAL OF MADRAS : I. L. R. 51 Mad. 31 : 53 M. L. J. 792 (F. B.)

The question is not one capable of much argument. So far as S. 92, Civil Procedure Code, is concerned, it cannot be said to bear on the question as it does not prohibit the awarding of the reliefs grantable under the section on applications. It only prohibits suits. The real question, therefore, is whether the insertion of such clauses in a decree is *ultra vires.* That is a matter of procedure. The Privy Council in the *Tirupathi case, Prayog Doss Ji Varu* v. *Tirumala Sriranga-charla Varu* (1), would seem to sanction such insertion. The seheme was settled in that case by their Lordships of the Privy Council of whom Lord Macanaghten was one with the assistance of Sir Robert Finlay to whose official experience as *Attorney General* their Lordships specially refer.

SUKDEDOSS *v.* GOVINDOSS : L. R. 55 I. A. 32 : I. L. R. 51 Mad. 96 : 54 M. L. J. 130 (P. C.)

In this case, their Lordships point out that to make a contract for sale of goods a wagering contract, it is not sufficient that delivery was not *expected* to be insisted upon or that it would have been considered bad form to do so, but that it should be found that it was a term of the contract itself that delivery of goods should not be insisted upon. In this case, there was a contract of sale and so long as there was no *potta potti* order for delivery, there was no impediment to the contract being enforced accordirg to its terms though it would have been bad form to have done so. Their Lordships, accordingly, held that the contract was not bad as a wagering contract. Their Lordships however dismissed the suit on another ground, *viz.*, that the appellant was not in a position to make the delivery, being at the time of the *potta potti* delivery order not in possession of the goods, and that the *potta potti* delivery order was not tantamount to a delivery so as to entitle the plaintiff to sue for the price but was only an arrangement by which plaintiff was no longer entitled to ask for delivery of the goods but only differences in price.

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1. (1907) L. R. 34 I. A. 78 : I. L. R. 30 M. 138 : 17 M. L. J. 236 (P. C.).

JAGANNATHA PILLAI v. KATHAPERUMAL PILLAI: I. L. R. 51 Mad. 76 : 53 M. L. J. 688.

This is another illustration of the thoroughly unsatisfactory nature of the provisions of the Estates Land Act. S. 192 says that all the provisions of the Civil Procedure Code save certain provisions, of which S. 313 relating to the setting aside of sales in execution on the ground of want of saleable interest is one, subject to such modifications as have been introduced by the Act, shall apply to proceedings under the Act. The question is whether application to set aside a sale on the ground of fraud or material irregularity in the publishing and conducting of sale lies and, if it does, whether a suit is precluded by reason of the provision of S. 312. The view of their Lordships is that S. 124 of the Act shows that such an application does not lie, that for the matter of that no order under S. 312 either confirming the sale or setting aside the sale except under S. 131 of the Act is contemplated by it. S. 124 says that if no application is made under S. 131 to set aside the sale, a certificate shall be issued to the purchaser and this provision in their Lordships' opinion clearly excludes an application under S. 311 (O. 21, R. 90). But S. 132 makes the provisions of Chapter VI only applicable so far as may be. It is not quite clear why the Revenue Courts should not be entrusted with the work of deciding the comparatively easy questions of fraud and irregularity in the publishing and conducting of sale and the reasons which induced the legislature to have those questions speedily decided equally apply to sales by Revenue Courts as to sales by Civil Courts. In fact S. 244 (S. 47) is not one of the sections excluded by S. 192. Chapter VI can by no means be regarded as a complete code so far as the execution of Revenue Court decrees is concerned. It has got to be supplemented by the provisions of the Civil Procedure Code relating to execution. Nor is it clear that appeals will not lie from such orders having regard to the definition of decree which excludes only orders under S. 47 from which appeals lie under O. 43. O. 43 being excluded, these particular orders would not come within the exception and by force of the main clause would be decrees from which appeals and second appeals might lie. Second appeals lie from rent decrees though they are, but for S. 189, of the nature cognisable by Courts of Small Causes. Analogous reasoning would justify the above

conclusion. Anyway, that the parties should have recourse to costly process of a suit to set aside a sale on any ground of irregularity could not have been in the contemplation of the legislature. The Full Bench decision in *Jagannadha Charyulu* v. *Satyanarayana Varaprasada Rau* (1) had not the obstacle presented by S. 47 to consider, whereas in the case of execution sales whether by Revenue Courts or by Civil Courts there is that section to be considered. The question of the validity of the sale which took place in execution is obviously a matter relating to the execution of the decree. [See *Veyindramuthu Pillai* v. *Maya Nadan* (2), *Nadamuni Narayana Aiyangar* v. *Veerabadra Pillai* (3)].

PANCHU SAHU *v.* SHEIKH MUHAMMAD YAKUB, I L R 7 Pat. 76.

This judgment prefers the view of the Calcutta and Madras High Courts in *Bhola Nath Bhattacharjee* v. *Kanti Chandra Bhattacharjee* (4) and *Ramasami Kone* v. *Sundar Kone* (5) to the view that found favour with the Bombay High Court in *Satwaji Balajirav* v. *Sakhar Lal Atmaram Shet* (6). We agree that the mere confirmation of the decree of the trial court by a court of appeal does not *ipso facto* extend the time fixed by the trial court for the performance of any condition. We invite attention to the discussion of the question in 52 M. L. J., pages 54 and 55 (Journal portion).

GOKHUL PANDE *v.* BALDEO SUKUL, I L R 7 Pat. 90.

The admissibility of the additional evidence tendered in this case turned upon the applicability of S. 32, cl. (5) of the Indian Evidence Act. The learned Judges hold that the evidence was admissible as the Indian Law is wider than the English Law on the point. No doubt the statement as to the existence of the relationship between any two persons, made by a person with special means of knowledge, is admissible not only on that issue but also on other relevant issues. The

1. (1919) I L R 43 M 351 : 37 M L J 706.
2. (1919) I L R 43 Mad. 107 : I L R 38 M L J 32 (F B).
3. (1910) I L R 34 Mad. 417 : 21 M L J 928.
4. (1898) I L R 25 C 311. 5. (1908) I L R 31 M 28 : 17 M L J 495.
6. (1915) I L R 39 B 175.

illustration (*l*) to S. 32 itself shows that the Indian Law is different from the English Law. See also *Dhanmull* v. *Ram-Chunder Ghose* (1), *Mahomed Syedal Ariffin* v. *Yeoh Ooi Gark* (2). But the objection to the statement in the particular case being admissible was not because it was not relevant on the issue but because it was alleged that the statement was not made *ante litem motam*. The judgment under notice does not meet this argument. The section itself requires that the statement must be made before the question in dispute was raised. No doubt the dispute should relate to the particular subject in issue but it is well established that even if the existence of the controversy is not known to the declarant, the statement is inadmissible. Similarly also the evidence will be inadmissible "even though the former controversy was between different parties or had reference to a different property or claim, if matters to which the statement relates were already under discussion in the former dispute". See Taylor on Evidence, S. 663. See also *Berkeley Peerage case* (3). Applying the rule as stated above to the facts of the particular case, it would appear that the statement would be inadmissible as not having been made *ante litem motam* unless it be that the relationship of the person as spoken to in the previous deposition now sought to be admitted was altogether collateral to the defence in the prior suit with reference to the denial of the alleged reversionship of the plaintiffs therein. In the absence of fuller particulars as regards the exact nature of the respective contentions of the plaintiffs and the defendants in the earlier litigation of 1915, wherein the deposition now sought to be admitted in evidence was given, it cannot be said that the contention of the appellants is wrong. The judgment however throws no light on this matter.

HERBERT FRANCIS *v.* NAWAB SAIYID MUHAMMAD AKBAR, I L R 7 Pat. 99.

A mortgage bond executed out of British India which was sent to British India for registration was lost before the actual registration thereof. In a suit to recover the debt, a copy of the bond was tendered as secondary evidence. As the original bond was unstamped, objection was taken to the reception of secondary evidence on the authority of the Privy Council deci-

1. (1890) I L R 24 C 265.
2. (1916) L R 43 I A 256 : L R (1916) 2 A C 575 (P C)
3. (1811) 4 Camp. 401.

sion in *Rajah of Bobbili* v. *Inuganti China Sitaramaswami Garu* (1), as the original document was itself not admissible in evidence. This judgment holds that the document having been executed out of British India did not require to be stamped as a bond though if it had been registered as a mortgage bond it would have attracted duty and that S. 35 has no application in consequence. It is not clear why the document does not come under S. 3, cl. (c). For the purposes of the Stamp Act, the document must be taken as it reads and the fact of its subsequent non-registration and its invalidity as a mortgage cannot affect the question. When the document was received in British India, it was a document which *ex facie* was a mortgage bond as defined in the Stamp Act and, as it related to immoveable property in British India, the document would attract duty under S. 3, cl. (c). It may be a different matter, however, if the document was altered into a mere bond, the clauses relating to the mortgage over immoveable properties being deleted by consent of parties prior to its receipt in British India. In the view that the document attracted stamp duty on its receipt in British India, S. 35 of the Act, which permits the admission of the document on payment of stamp duty and penalty, will not help the plaintiff, as the original deed is not available. Similarly also the terms of S. 36 cannot be relied on, as it must be taken on the principle and reasoning of the Privy Council in *Rajah of Bobbili* v. *Inuganti China Sitaramasami Garu* (1), that it is appilcable only to the admission of the original document in evidence.

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1. (1899) L R 26 I A 262 : I L R 23 M 49 (P C).

TULSHI RAM *v.* BISHNATH PRASAD, I L R 50 All. 1.

It is settled law that when a suit is brought to enforce a debt of the father, the son can escape liability only by showing that it is illegal or immoral and as such not payable by him and that that burden is not discharged by showing generally that the father was a man of immoral or vicious habits. It is also well settled that the father can alienate family property for antecedent debts. One should have thought that it followed as a matter of course from these two positions that when a suit is brought on a mortgage for antecedent debts the burden should lie on the son to show that the debts were immoral or illegal and as such not binding on him. The burden would be on the creditor to prove the existence of the antecedent debt, but when he has shown that, the burden would necessarily be shifted on to the son to show the illegality of the debt. The whole confusion is due to taking certain observations by the Privy Council, where they speak of the property going out of the family and the son impeaching the transaction [*Suraj Bansi* v. *Sheo Prasad* (1)], as excluding the application of the rule as to burden in situations other than those that they speak of. Their Lordships in this case rightly rejected the contention. A similar confusion exists as to sales for antecedent debts. It is imagined because a father may effect a sale for antecedent debts, the power may be exercised without reference to the question whether the extent of the debts justified the exercise of the power and whether the terms secured were reasonable.

The whole trouble comes out of trying to decide questions without reference to principle.

JAIKARAN SINGH *v.* SHEO KUMAR SINGH : I. L. R. 50 All. 36.

To the cases cited as justifying the conclusion arrived at in this case we may add *Sanagapally Lakshmayya* v. *Intoory Bolla Reddy* (2) where the principle was extended to the case of the mortgagee in default purchasing it from the purchaser at revenue sale. The principle on which the decision is put in that case is that the mortgagee cannot be allowed to take advantage of his own default and plead for his own benefit that, by reason of such wrong, there has been a statutory extinction of the mortgage security. In *Deo Nandan Prashad* v. *Janki Singh* (3) their Lordships explain the principle to be "however

1. (1879) L R 6 I A 88 : I L R 5 C. 148, at p. 171 (P C).
2. (1902) I L R 26 M 385.
3. (1916) L R 44 I A 30 : I L R 44 C 573 : 32 M L J 206 (P C).

free from blame the minor (the mortgagee) may have been, he cannot profit by his agent's deliberate default committed in breach of the terms of the mortgage". Their Lordships held that a co-owner, committing default in the payment of revenue, he is bound to pay, and purchasing the property free of the rights of his co-owner, was in the same position. S. 88 of the Trusts Act would seem to apply to these cases.

PARSOTAM SARAN *v.* BARHMA NAND: I L R 50 All. 41 (F. B.).

The question in this case was as to the effect of a sale in execution of a decree taking place in ignorance of the stay order passed by the Appellate Court. The purchaser was a stranger. The Full Bench holds that the sale is good and cannot be set aside. The same view is taken by a Full Bench in Madras in *Venkatachalapati Rao* v. *Kameswaramma* (1). Mr. Justice Mukherjee makes a distinction between the case of a stranger purchaser and a decree-holder purchaser. While in the case of the stranger, he would not be affected by the uncommunicated order, the decree-holder, he holds, would be bound by it and the sale is liable to be set aside on a principle analogous to that governing restitution.

BAIJNATH PRASAD *v.* NARAIN PRASAD, I L R 50 All. 51.

Except in the case of Calcutta and Lahore High Courts, the Courts in India would seem to be agreed that an award on a reference out of court pending suit might be acted on as an adjustment of the suit under O. 23, R. 3, but, those rulings cannot justify dealing with an award on a reference through court pending suit on that footing, ignoring the conditions and limitations laid down in the schedule. Even in the case of an award on a reference out of court treated as an adjustment, objection such as misconduct of the arbitrators is available and if it is vitiated by such misconduct no decree can be passed.

ABDUL SATHAR, *In re*: 54 M. L. J. 456.

The decision in this case is substantially correct. Whether the facts made out an offence under S. 363 or S. 366, Indian Penal Code, was preliminary to the argument that the First class Magistrate had no jurisdiction. The learned Judge, having

1. (1917) I L R 41 M 151 : 33 M L J 515 (F B).

found that S. 363 applied, there was an end of the question. The second point was whether the offence was not made out because the girl wanted to go away with the accused. It was argued that the consent of the girl avoided the offence. Strictly speaking, this was confusion. The only question was whether there was taking or enticing out of the keeping of the lawful guardian. Where the girl was driven away by the guardian, there was no offence [*Pandyaram* v. *Emperor* (1)], because there was no guardianship. If under any particular set of circumstances it is possible to hold that the girl is effectively out of guardianship, then there can be no taking. *R.* v. *Meadows* (2) which was criticised in *R.* v. *Kipps* (3) was a peculiar case and can be defended on this basis. *R.* v. *Robins* (4) was very near the border-line if you went on the doctrine of consent. In that case, A. went in the night to the house of B., and placed a ladder against the window of the girl down which she came and eloped with A. It was held that the offence was committed. Similarly in *R.* v. *Biswell* (5), where the girl and man quitted the house in consequence of a proposition which emanated from the girl. The substance of the matter seems to have been well laid down by Sanderson, C. J., in *Emperor* v. *Safdar Reza* (6): "One object of the sections under consideration is not only to protect the rights of parents and others having the lawful guardianship of girls under the age of sixteen, but also to protect the girls themselves and to prevent persons taking improper advantage of their youth and inexperience". This, we think, is the proper principle and Srinivasa Aiyangar, J., might have put the decision under discussion on this ground.

KONAMMAL *v.* ANNADANA : L R 55 I A 114 : I L R 51 Mad. 189 : 54 M L J 504 (P C).

The judgment of the Privy Council in this case satisfactorily clears the confusion resulting from various contradictory rulings of that tribunal. On the one side, we had *Raja Yarlagadda Mallikarjuna Prasada Nayudu* v. *Raja Yarlagadda Durga Prasada Nayudu* (7), where the Privy Council had ruled that a suit for partition in respect of the partible property of a joint family followed by a decree did not operate as severance in respect of the impartible estate. *Tara Kumari* v. *Chaturbhuj Narayan Singh* (8), on the other hand,

1. (1912) M W N 538.
2. (1844) 1 Car. & Kir 399.
3. (1850) 4 Cox Crl. Cases 167.
4. (1844) 1 Car & Kir 456.
5. (1847) 2 Cox Crl. Cases 279.
6. (1922) I L R 49 C 905.
7. (1900) L R 27 I A 151 : I L R 24 M 147 : 10 M L J 294 (P C).
8. (1915) L R 42 I A 192 : I L R 42 C 1179 : 29 M L J 371 (P C).

laid down that partition in respect of all the partible property of the family operated as a complete severance in respect of the family, the impartible estate being in no sense joint family property. Again we had the various rulings of the Privy Council that a unilateral declaration of an individual member of the family was enough to effect a separation of status in respect of him. How far would these rulings apply to impartible estates? If they did to the full extent, it would have been in the power of the holder of the estate by a declaration of his to put an end to the joint status of the family and effectively cut off all the junior members with nothing. That would have been obviously very unsatisfactory. That there could be a renunciation in advance was held in *Periasami* v. *Periasami* (9) and the possibility of a separation by consent is assumed in *Vadrevu Ranganayakamma* v. *Vadrevu Bulli Ramayya* (10) and *Tara Kumari* v. *Chaturbhuj Narayan Singh* (8). In this case their Lordships explain *Tara Kumari* v. *Chaturbhuj Narayan Singh* (8) as a decision on the facts. that there was a complete separation even in respect of the impartible estate (though the observations in that decision would seem to have a larger operation) and lay down, agreeing with Mr. Justice Ramesam, that "in order to establish that an impartible estate has ceased to be joint family property for the purposes of succession, it is necessary to prove an intention expressly or impliedly on behalf of the junior members of the family to give up their chance of succession to the impartible estate". A limitation of the kind suggested would seem to be necessary in the circumstances of the case, but the precise legal basis of the distinction is not indicated. Either, the rule of succession being a customary mode of succession though one indicated by the Mithakshara, the only way of putting an end to the custom is by consensus of the family and short of it, so far as individuals are concerned, by renunciation of their interest in the estate or the rule as to unilateral declaration must be confined to partible property where such a declaration would only mean readjustment of rights by way of partition and cannot be extended to a situation where upholding it would mean the confiscation of the rights of the other members. The texts from which the rule is inferred, it will be seen, refer only to normal cases.

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8. (1915) L R 42 I A 192 : I L R 42 C 1179 : 29 M L J 371 (P C).
9. (1878) L R 5 I A 61 : I L R 1 M 312 (P C).
10. (1879) 5 C L R 439 (P C).

VENKATRAMAN MUKUND *v.* JANARDHAN BABURAO, I L R 52 Bom. 16.

In this case a number of questions have been discussed though a decision on most of them was unnecessary for the ultimate conclusion. In the course of the judgment the learned Judges have not expressed a decided opinion on the question, whether benefit apart from necessity will support a sale of joint family properties by the manager. On the finding that the alienation in the particular case was not beneficial to the family it was unnecessary for the learned Judges to express any opinion on the question. Still the learned Judges have expressed an inclication to the view that mere benefit apart from necessity will not justify an alienation of joint family properties. It is somewhat strange that at this time of day, the question does not admit of a definite answer one way or the other and they should feel bound to leave it open, especially as the question is one of constant occurrence. The word "necessity" itself when used in connection with alienations by managers of joint families, limited owners or *shebaits* has not to be understood in the sense of actual compulsion but in a somewhat special, almost technical, meaning. It includes the kind of pressure which the law recognises as serious and sufficient, such as the obligatory ceremonies according to Hindu conceptions. For instance, in the case of a Hindu widow, alienation of immovable properties for the payment of the last owner's debts, maintenance of herself and even her own children would be upheld under the head of necessity. See *Ramsumran Prasad* v. *Shyam Kumari* (1). That apart from necessity understood in this wide signification, an alienation can be supported on the ground of benefit has been recognised since at least *Hunoomanpersaud Panday* v. *Musammat Munraj Koonweree* (2). That the Privy Council has not deviated to any extent in *Palaniappa Chetty* v. *Sreenath Devasikamani Pandara Sannadhi* (3) from what they laid down so early, can easily be realised from the fact that they expressly followed it in the later case. There seems, therefore, to be no reason to restrict the principles laid down in the leading case, although the question in each case will be whether the transaction is beneficial or not. The question does not seem to have been fully discussed in the

1. (1922) L R 49 I A 342 : I L R 1 Pat. 741 : 44 M L J 751 (F C).
2. (1856) 6 M I A 393.
3. (1917) L R 44 I A 147 . I L R 40 M 709 : 33 M L J 1 (P C).

case of *Vishnu* v. *Ramchandra* (4) to which reference has been made by the learned Judges. On the other hand, the question has been fully considered with reference to all the important decisions in the recent case of *Jado Singh* v. *Nathu Singh* (5) and the conclusion has been arrived at that benefit even apart from necessity will support an alienation of joint family properties. The decision of the Privy Council in *Palaniappa Chetty* v. *Sreemath Devasikamani Pandara Sannadhi* (3) which is supposed to have laid down the stricter rule has also been considered by the learned Judges of the Allahabad High Court. The same conclusion has been arrived at by the Madras High Court in *Mahalakshmamma* v. *Ramaswami* (6) following earlier decisions commencing from *Krishnasami Doss Reddi, In re* (7). See, however, *Doraiswami Aiyar* v. *Venkatarama Aiyar* (8). The same view has been taken by the Calcutta High Court after a full consideration in *Krishna Chandra Choudhury* v. *Ratan Rani Pal* (9) and *Sm. Ishani Dasi* v. *Ganesh Chandra Rak Shit* (10) and by the Patna High Court in *Ram Bilas Singh* v. *Ramyad Singh* (11). The question is one of frequent occurrence before the subordinate courts and it is not desirable that it should have been left open, and the answer, we venture to submit, is not in doubt having regard to the above decisions which have been given subsequent to the pronouncement of the Privy Council in *Palaniappa Chetty* v. *Sreemath Devasikamani Pandara Sannadhi* (3).

In re HYDERBHAI HUSSENBHAI, I L R 52 Bom. 126.

The point that came up for consideration in this case, whether, under the Presidency Towns Insolvency Act, a creditor can present a petition in insolvency against a debtor at any time when the latter's properties are under attachment or within three months after the cessation of such attachment which has lasted for more than twenty-one days, is one uncovered by authority in this country. The point is a narrow one on the language of S. 9 (*e*) of the Presidency Towns Insolvency Act. This provision was introduced for the first time in the Presidency Towns Insolvency Act of 1909. There is no corresponding provision even in the present Provincial Insolvency Act of 1920, S. 6 (*e*) of the Act; and there was none in the Provincial Insol-

3. (1917) L R 44 I A 147 I L R 40 M 709 : 33 M L J 1 (P C).
4. (1923) 25 Bom. L R 506.
5. (1926) I L R 48 A 592.
6. (1926) 50 M L J 657.
7. (1912) M W N 167.
8. (1920) 13 L W 618.
9. (1915) 20 C W N 645.
10. (1918) 23 C W N 858
11. (1920) 5 Pat L J 622.

vency Act, of 1907. Even in England, there was no similar provision prior to the Bankruptcy Act of 1890. Those provisions only referred to a sale in execution of the debtor's property as constituting an act of insolvency or bankruptcy. It is significant that the language of S. 9 (*e*) of the Presidency Towns Insolvency Act is not identical with the language of S 1 of the English Bankruptcy Act of 1890, which has been re-enacted in the present English Bankruptcy Act. There is therefore some force in the contention that, under S. 9 (*e*) of the Indian Act of 1909, what is required is that there should have been an attachment of the debtor's property for a period of not less than twenty-one days and even one year is such a period and it is therefore one continuous act of insolvency whatever may be the length of the period that the properties are under attachment. It is difficult to see why the Indian Legislature has used language different from that of the English enactment especially when it had received judicial consideration by the Court of Appeal in England, prior to 1909. But once the learned Judges came to the conclusion that the Indian Legislature did not mean anything different by the provisions of S. 9 (*e*) of the Presidency Towns Insolvency Act, the law as expounded by the Court of Appeal in *In re Beeston* (1) by Vaughan Williams, L. J., on a question of Bankruptcy, law and by Lindley, M. R., following a prior decision in *In re Hurley* (2), directly applies and the act of insolvency is complete after twenty-one days of the attachment and unless the creditor's petition is presented within three months therefrom, it is not an available act of insolvency.

HARI LAXMAN *v.* THE SECRETARY OF STATE FOR INDIA, I L R 52 Bom. 142.

The principles acted upon in this case are strictly in accordance with the decisions in England regarding the effect of the impossibility of performance under a contract, although it may well be doubted whether S. 56 of the Indian Contract Act, enacts exactly the English rule on the subject for this country. It may be remarked that even in England, at the time of the enactment of the Indian Contract Act, the principles on this branch of the law were not clearly appreciated and one may almost say that they are still in the making and have only been expounded in the cases that arose out of the late war and its effect on contractual rela-

1. L R (1899) 1 Q B 626. 2. (1893) 10 Mor. 120.

tions. That the pronouncements on the question in England have not always been uniform or consistent is clear from their examination by Lord Sumner in *Bank Line, Ltd.* v. *Arthur Capel & Co.* (1). Still if the term impossibility in S. 56 is understood in the sense of physical or legal impossibility as laid down in the Indian decisions, see *Ezekiel Abraham* v. *Ramjusroy* (2), *Karl Ettlinger* v. *Chagandas & Co.* (3) and *Gowri Sankar Agarwalla* v. *H. P. Maitra* (4), it is not difficult to harmonise the law as enacted by the section with the recent English decisions. The theory of "implied term", as it is some times called, with regard to future impossibility of performance can easily be brought under the category of implied agreement under the Indian Law as also under S. 56. It may be a question whether a strike of workmen rendering the performance of a contract impossible in the sense understood by the Indian decisions will not avoid a contract altogether, if it was unforeseen. It would seem in England that if a person makes a contract absolute in terms it would not be affected by the subsequent impossibility of its performance. It may be a question whether on the language of S. 56, the same results will follow.

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1. L R (1919) A C 435.
2. (1920) 33 C L J 151
3. (1915) I L R 40 B 301.
4. (1921) 26 C W N 573.

NALLAPERUMAL *v.* SAKUL HAMED, 54 M L J 721.

The applicability of S. 47, Civil Procedure Code, to cases where parties are exonerated has been discussed often. *Sivasamba Aiyar* v. *Kuppan Samban* (1) decided that one who claimed paramount title in a mortgage suit and who was subsequently exonerated from it was bound by S. 47, Civil Procedure Code. But *Krishnappa* v. *Periyaswami* (2) made a distinction and held that where the exoneration was due to misjoinder the party did not remain one for the purposes of S. 47. When *Sannamma* v. *Radhabayi* (3) was before the Division Bench, the learned Judges entertained doubts as to the soundness of *Krishnappa* v. *Periyaswami* (2) and referred the matter to the Full Bench. Wallis, C. J., in the leading judgment without deciding whether *Krishnappa's case* (2) was rightly decided had no doubt about the applicability of the section to a case where a party had been properly impleaded as a defendant and the case would have proceeded to judgment but for the fact that the plaintiff elected to abandon his case in part and the suit was consequently dismissed against such defendant. *Sethu Konar* v. *Ramaswami* (4) and *Linga Aiyar* v. *Lakshmana Chettiar* (5) both held that the section would be applicable in such cases. But in the former of these Spencer, J., introduced a circumstance of distinction, *i.e.*, that if, as a consequence of the exoneration, the name of the party is removed from the record, S. 47 will not apply. The observation of the learned Judge was not necessary to the decision of the case, because in that particular case the name of the party was on the record. But in *Linga Aiyar* v. *Lakshmana Chettiar* (5) where the former order of the Munsif was as follows:—"By consent, I strike off the 2nd defendant's name. Plaintiff will pay half his costs", a suit filed by the 2nd defendant was held barred by S. 47. This was the state of the case-law when *Nallaperumal* v. *Sakul Hamed* came up for decision. Srinivasa Aiyangar, J., deliberately refrains from considering the question of parties and it appears from his judgment that the appellant's vakil was not permitted to argue the question whether the plaintiff was a party to the original suit. But Anantakrishna Aiyar, J., founds himself just on the circumstance that the plaintiff's name was removed from the record. No refer-

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1. (1915) 29 M L J 629. 2. (1916) I L R 40 M 964 : 32 M L J 532
3. (1917) I L R 41 M 418 : 34 M L J 17 (F B).
4. (1925) I L R 49 M 494 : 50 M L J 205. 5. (1925) 50 M L J 387.

ence is made to the previous decisions or to *Venkatapathi* v. *Subbaraya* (1), where it was laid down that the mere fact that the name of the exonerated party was not formally removed from the record pursuant to the order exonerating him would not affect the question as to whether he remained a party. It would have been more satisfactory if the learned Judges had considered the cases already decided. If ever the question comes up for consideration again, it is to be greatly feared that *Nallaperumal* v. *Sākul Hamed* may not be particularly helpful.

V. P. R. V. CHOCKALINGAM CHETTY *v.* SEETHAI ACHI, L R 55 I A 7 : I L R 6 Rang. 29 : 54 M L J 88 (P C).

The addition of party respondents in appeals of persons who, though parties to the original suit, have not been impleaded as respondents when the appeal was first filed is now regulated by O. 41, R. 20, Civil Procedure Code. The High Courts had taken conflicting views on the meaning of the corresponding S. 559 of the old Code. Vide *Subramaniam Chetty* v. *Veerabadran Chetty* (1-a), *Atmaram* v. *Balakrishnan* (2) on the one hand and *Upendra Lal* v. *Grindora Nath* (3) and *Rup Jaun Bibee* v. *Abdul Kadir* (4) on the other. This judgment of the Privy Council delivered by Sir John Wallis affirms the decision of the court below reported in 2 Rang. 541 which specifically follows the Madras view and dissents from the contrary view of the Calcutta Courts. It may be noted that the decision in *Subramaniam Chetty* v. *Veerabadran Chetty* (1) was that of a bench of which Justice Wallis was a member. Notwithstanding the fact that the new Code of 1908 has now a new rule, O. 41, rule 33, giving wider powers to appellate courts, the Privy Council has chosen to take the restrictive interpretation of O. 41, rule 20, which found favour with the Madras High Court. A party who has got a decree in his favour against whom an appeal has not been preferred within the time allowed by the law of limitation is not "a person interested in the result of the appeal" that may have been filed against other persons. It must now be taken that the proposed party respondent must be shown to have some interest in the result of the pending appeal before he is brought on record

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(1) (1907) 17 M L J 416.

(1-a) (1908) I L R 31 M 442 : 18 M L J 452.

2. (1883) I L R 5 All. 267. 3. (1898) I L R 25 C 565.

4. (1904) I L R 31 C 643 (F B).

and the interest he may acquire as a result of being added as respondent will not suffice. So interpreted, the powers of the appellate court are greatly curtailed and it is apparent that the rule will have very limited scope for its operation. Even in the decision in *Subramanian Chetty* v. *Veerabadran Chetty* (1), the difficulties and hardship involved in such a narrow construction were pointed out by the learned Judges. The insertion of a new rule in O. 41, rule 33 seems to indicate that the Legislature intended to give wider powers to the appellate court and it would have been in consonance with the intention of the Legislature to interpret O. 41, rule 20 liberally. The Madras High Court itself had in later cases taken a different view, vide *Ponnuswami Asari* v. *Palaniandi Mudali* (5). It is doubtful whether it can now be taken that O. 41, rule 20 is not exhaustive of the powers of the appellate court to add party respondents and whether any reliance can be placed on O. 1, rule 10 and S. 107 to justify wider powers.

The scope of O. 41, rule 33 has been considered by the Privy Council in an earlier case *Mahomed Khaleel Shirasi* v. *Les Tanneries Lyonnaises* (6) and the tendency of their Lordships' observation is towards taking a restrictive view of the scope of the section. In the present decision also their Lordships are not inclined to extend the scope of O. 41, rule 33 and they leave open the question if a decree can be passed for or against parties not parties to the appeal.

As regards the other point dealt with in the judgment, it must be borne in mind that the decree of the Trial Court declared the sale deed to be perfectly valid as between the plaintiff and the 1st defendant. It is only because this portion of the decree had become final as between the parties that the appeal court had to dismiss the appeals as it was not permissible to go behind that declaration for the purpose of the appeal and no basis of relief other than an attack on this declaration was urged by the appellants as entitling them to get the decree reversed. The decision will not necessarily be applicable to cases where in the first instance the plaint asks for possession only from the defendants and prays for no relief by way of declaration as to the *benami* character of the various sales and the decree also is silent on the question. In such cases even if the original purchasers were formal parties to the suit in the trial court it may

1. (1908) I L R 31 M 442 . 18 M L J 452.
5. (1919) 11 L W 602.
6. (1926) I L R 49 M 435 : 51 M L J 570 (P C).

not be necessary to add them as party respondents in the appeal and it may be sufficient to appeal against the party in possession of the properties sought to be recovered. This decision of the Privy Council does not suggest that every purchaser in the chain of title should necessarily be parties to the suit and appeal.

Lastly the observations of their Lordships as regards the duties of the Official Receiver should not be understood as a pronouncement that the sale by the Official Receiver was invalid under S. 6 of the Transfer of Property Act. What was sold by the Official Receiver was not a mere right to sue but the interests of the insolvent in the actual properties, though such interests were unsubstantial and shadowy. The point of their Lordships' observation was merely that the Official Receiver must investigate the nature of the alleged rights and was not bound to sell shadowy claims for what they were worth and thus promote frivolous litigation.

U MIN DIN *v.* PO THAUNG, I L R 6 Rang. 60 (F. B.).

This Full Bench decision of the Rangoon High Court holds that a suit for mesne profits (whether the profits sought to be recovered were those actually received by the defendant or what he ought to have received with due diligence) is not cognizable by the Provincial Small Cause Courts as such a suit is exempted from their jurisdiction under Art. 31 of the Act IX of 1887. This is in accordance with the view of the Madras and Allahabad High Courts, see *Savarimuthu* v. *Aithurusu Rowthar* (1) though the Calcutta Court had taken a contrary view in *Kunjo Behari Singh* v. *Madhub Chundra Ghose* (2). All the arguments for and against are marshalled in this Full Bench judgment. We agree that the sounder view is the one adopted by this decision and the Madras High Court. It is however necessary to add that this class of suits must be distinguished from the type of suits as in *Annamalai* v. *Subramanyan* (3) where a plaintiff in possession seeks to recover damages from the defendant by way of compensation for a single act of trespass by the defendant.

[END OF VOL. LIV.]

1. (1901) I L R 25 M 103 : 11 M L J 428 (F B).
2. (1896) I L R 23 C 884 (F B).
3. (1892) I L R 15 M 298 : 2 M L J.15.

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NOTES OF RECENT CASES.

The Chief Justice, Wallace and *Beasley, JJ.*
8th December, 1927. — R. C. No. 10 of 1927.

Income-tax Act, S. 10—*Money-lending business—Loss incurred in respect of suretyship transaction—If can be deducted.*

The amount of loss incurred by a money-lender in respect of a suretyship transaction by him cannot be deducted from the assessable income.

T. Ramachandra Rao for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

N. S.

Phillips and *Madhavan Nair, JJ.*
8th December, 1927. — Cr. App. No. 592 of 1927.

Penal Code, S. 96—*Private defence—Plea not set up—Prosecution evidence disclosing—Duty of Court to consider.*

Though the accused does not plead the right of private defence, the Court is bound to consider the plea if it is disclosed by the prosecution evidence.

K. Kuttikrishna Menon for Accused.

The Public Prosecutor for the Crown.

N. S.

The Chief Justice, Wallace and *Beasley, JJ.*
8th December, 1927. — R. C. No. 6 of 1927.

Income-tax Act, S. 10 (2) (3)—*Assessee carrying on business in British India and outside British India—Capital borrowed in British India but sent to place outside British India—Interest paid on—If can be deducted.*

Where an assessee had money-lending businesses in places within British India and also places outside British India and borrowed capital within British India but sent it for the business outside British India,

Held, that the interest paid on this borrowed capital could not be deducted from the assessable income of the business within British India.

K. S. Krishnasami Aiyangar for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

N. S.

N R C

The Chief Justice and *Anantakrishna Aiyar, J.* *9th December*, 1927. } C. C. C. A. No. 4 of 1926.

Limitation Act, Arts. 11 (*a*) *and* 13—*Scope and applicability.*

Article 11 (*a*) of the Limitation Act does not apply to proceedings under Chap. VII of the Presidency Town Small Causes Courts Act, as the proceedings are not in the nature of a suit and the order passed thereon does not amount to a decree.

25 L. W. 115 followed.

Article 13 of the Limitation Act does not apply in a case where an order was passed dismissing an application for ejectment filed under S. 41 of the Small Cause Courts Act, as such an order is not a final order under S. 49 of the Small Cause Courts Act.

M. S. Venkatarama Aiyar for Appellant.

K. S. Jayarama Aiyar for Respondent.

N. S.

Devadoss, J. *12th December*, 1927. } C. R. P. No. 235 of 1926.

Civil Procedure Code, S. 80—*Notice to Railway Company given under the Railways Act—Railway Company subsequently taken over by Secretary of State—Suit against Railway Company and Secretary of State—Absence of notice to Secretary of State before suit—Effect.*

A consignee of certain goods gave a notice of suit under S. 77 of the Railways Act. Some time after the notice was given the Railway Company was taken over by the Secretary of State. The suit was then instituted both against the Railway Company and the Secretary of State. No previous notice was given to the Secretary of State as required by S. 80, C. P. Code.

Held that, the Secretary of State having taken over the management of the Railway subsequent to notice under S. 77 of the Railways Act, he must be deemed to have taken over the Railway Company subject to the liabilities and the rights of action which had already accrued and therefore notice under S. 80, C. P. Code, to the Secretary of State was not necessary for the institution of the suit.

O. T. Govinda Nambiar for Petitioner.

P. V. Vallabacharulu for Respondent.

N. S.

The Chief Justice, Beasley and *Anantakrishna Aiyar, JJ.* *14th December*, 1927. } Ref. Case Nos. 3 and 16 of 1927.

Income-tax Act, S. 66—*Point not taken before the Commissioner as one to be referred to the High Court—Power of High Court to direct the Commissioner to make a reference on the point.*

Where the assessee did not ask the Commissioner to refer a particular point to the High Court, the High Court cannot direct the Commissioner to refer that particular point under S. 66 of the Income-tax Act.

Nugent Grant for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

N. S.

The Chief Justice, Waller and *Ananta-krishna Aiyar, JJ.* 14*th December*, 1927. — Cr. Appeal No. 449 of 1927.

Criminal Procedure Code, Ss. 423 *and* 439—*Eight persons originally charged by the Magistrate—Discharge of three and committal of rest to Sessions by Magistrate—Acquittal of all by Sessions Judge—Appeal to High Court against acquittal—Power of High Court to set aside order of discharge.*

Eight persons were originally charged with murder but the committing magistrate discharged three persons and committed the rest to the Sessions. The Sessions acquitted all the accused and against this acquittal an appeal was preferred to the High Court by the Government.

Held, that the High Court has jurisdiction to set aside the order of discharge of the three accused by the committing magistrate and to direct them to be committed for re-trial on the same charge as the other five accused when setting aside the order of acquittal by the Sessions Judge.

Nugent Grant, K. P. Gopala Menon and *K. Kuttikrishna Menon* for Accused.

The Public Prosecutor for the Crown.

N. S.

Devadoss, J. 15*th December*, 1927. — Cr. R. C. No. 612 of 1927.

Madras District Municipalities Act—License to coffee hotel-keeper—Subsequent cancellation of license by Chairman of Municipal Council—Subsequent prosecution for doing business without license—Jurisdiction of Criminal Court to go into the validity of the cancellation of the license.

Where a license had been granted to a coffee hotel-keeper by a Municipality and the Chairman purported to cancel the license on a ground not falling within the terms of the license, the act of the Chairman is *ultra vires* of his powers; and if he launches a prosecution against the hotel-keeper for carrying on the business without license, the Criminal Court has jurisdiction to go into the question whether the cancellation of the license was valid or not.

T. R. Ramachandra Aiyar for Municipal Council.

M. Patanjali Sastri for Accused.

The Public Prosecutor for the Crown.

N. S.

Beasley, J. 15*th December*, 1927. — C. S. No. 543 of 1926.

Presidency Towns Insolvency Act, Ss. 58 *and* 59—*Official Assignee making forcible entry upon a person's premises and seizing his goods—Liability of the Assignee—C. P. Code, S.* 80—*Officer doing wrongful act outside the scope of his powers—Notice of suit if*

necessary—Wrongful attachment of goods—Damages—Absence of malice—Effect.

The Official Assignee cannot be considered to have acted in his official capacity when he makes a forcible entry upon the premises of a third person and seizes his goods. Seizure by him by threat of force is not permissible.

Where an officer does a wrongful act wholly outside the scope of his powers no previous notice under S. 80, C. P. Code, is necessary before the institution of a suit against him.

Where a person seeks to attach a third person's goods as the property of a person who is a party to the suit the wrongful attachment itself gives rise to the cause of action and no malice need be proved to maintain the claim.

2 Rang. 181 followed.

Nugent Grant and *K. Krishnaswami Aiyangar* for Plaintiff.

K. S. Krishnaswami Aiyangar and *S. Doraisami Aiyar* for Defendants.

N. S.

Kumaraswami Sastri, J.
16th December, 1927. S. A. No. 1478 of 1925.

Mortgage—Decree by puisne mortgagee subject to first mortgage—Purchase in execution—Right of purchaser to prove that first mortgage partly invalid.

A purchaser in execution of a decree obtained by the 2nd mortgagee subject to the first mortgage is entitled to plead in a subsequent suit by the first mortgagee that the first mortgage executed by the father is not binding on the sons' shares, not being for necessity, and that the property in his hands to the extent of the sons' shares is exempt from liability. There is no estoppel by reason of the fact that the sale was subject to the first mortgage.

31 All. 583 (P. C.) applied.

What is conveyed to the purchaser is the property with all the rights which the judgment-debtors had and not a mere right to sue and the purchaser has the same right to set aside the transaction which the sons (judgment-debtors) had.

L. R. 1 Eq. 337 followed.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for Appellant.

L. A. Govindaraghava Aiyar for Respondent.

N. S.

Jackson and Srinivasa Aiyangar, JJ.
19th December, 1927. S. A. No. 205 of 1925.

Decree—Impleading of wrong legal representative—Effect.

Where after the death of a defendant in a suit a wrong person is impleaded as legal representative, the decree obtained in the suit is binding on the proper legal representative even though he was not impleaded in the suit, unless it is found the plaintiff acted fraudulently or collusively in impleading the wrong legal representative.

K. S. Jayarama Aiyar for Appellant.

K. Rajah Aiyar for Respondent.

N. S.

Beasley, J. }
4th January, 1928. } C S. No. 553 of 1925.

Pledge—Delivery of pledged articles by the pawnee to the pawnor under an arrangement that the articles should be sold to a certain person—Security of pledgee if lost by this delivery—Delivery of the articles by the pawnor to the specified person—Admission by him that the articles were not sold to him—Right to retain articles as against pawnee for money advanced by him to the pawnor.

Where pledged articles are delivered by the pawnee to the pawnor under an arrangement that the articles should be sold to *A*, the delivery is only for a limited purpose and the pawnee does not lose his security by the delivery. Where *A* with whom the articles are left by the pawnor admits they have not been sold to him, he has no right to retain possession of them, as against the pawnee, for monies advanced by him to the pawnor, however innocent *A* may be.

1895 A. C. 56, followed.

N. Sivaramakrishna Aiyar and *S. Thyagarajan* for Plaintiff.

V. C. Gopalaratnam and *T. Krishnaswami Aiyar* for Defendants.

N. S.

Phillips and *Odgers, JJ.* }
5th January, 1928. } S. A. No. 1350 of 1924.

Malabar Law—Karar by Karnavan giving up right of management—Validity.

A karar to be valid as a renunciation of the Karnavanship must be a total and unconditional renunciation. Where a karar was executed for a consideration of Rs. 500, it is not an unconditional renunciation and therefore not valid.

28 M. 182, followed.

A karar permitting the delegation of the Karnavan's right of management is invalid.

12 M. 290, relied on.

P. Govinda Menon for Appellant.

K. P. M. Menon for Respondent.

N. S.

Ramesam and *Devadoss, JJ.* }
5th January, 1928. } C. M. A. No. 345 of 1927.

Civil Procedure Code, Order 22, Rule 4—Death of Defendant—Legal representatives already on record—Petition to bring on record legal representative—Necessity of.

Where a defendant is dead and all his legal representatives were already on the record no petition need be filed within three months to bring on record legal representatives. It is enough the fact of the death of the defendant is brought to the notice of the Court.

N R C

3 Pat. 853, not followed.

P. R. Ramakrishnaier for Appellant.

P. S. Narayanasamier for Respondent.

N. S.

Jackson, J.
6th January, 1928. } C. R. P. No. 28 of 1926.

Civil Procedure Code, S. 115—Dismissal of suit for default—Order for restoration on condition of plaintiff paying defendant's costs—Cost tendered by plaintiff and accepted by defendant—Subsequent revision by defendant—Maintainability.

A suit which was dismissed for default was ordered to be restored on condition of plaintiff paying defendant's costs. The costs were tendered by the plaintiff and accepted by defendant. Subsequently the defendant preferred a revision petition against the order restoring the suit.

Held, that the revision was not entertainable as the defendant must be deemed to have acquiesed in the order unless he showed that he received the benefit under compulsion or protest.

G. Lakshmanna for Petitioner.

P. Somasundram for Respondent.

N. S.

Devadoss and
Jackson, JJ.
6th January, 1928. } S A. No. 1340 of 1924.

Landlord and tenant—Notice to quit—Tenant bound to surrender the demised premises on demand—Necessity of notice.

Except in cases of tenancies from year to year or from month to month and tenancies at will no notice to quit is necessary for the determination of the lease unless the terms of the lease specifically provide for it. Where the lessor and the lessee have agreed that the leased property should be delivered over to the landlord on demand no notice to quit is necessary.

K. Kuttikrishna Menon for Appellant.

D. A. Krishna Wariar for Respondent.

N. S.

Devadoss, J.
9th January, 1928. } C. R. P. No. 788 of 1926.

Contract Act, S. 70—River Bund belonging to Government—Repairs by Union Board for the closing of the breach in the bund—Right to recover costs from the Government—Madras Local Boards Act, S. 150.

Owing to heavy rains there were floods in a river belonging to Government and the President of the Union Board to avoid danger to life and property closed up the breach and claimed the cost of repairs from the Government.

Held, that the Government as owner of the river which was used as source of irrigation and as deriving revenue therefrom was bound to keep the bund in proper repair and the Union Board having incurred the expense for the benefit of the Government without intending to do so gratuitously was entitled to the cost of the repairs.

Held, also that under S. 150 of the Madras Local Boards Act, the Union Board was entitled to the claim.

The Government Pleader for Petitioner.

S. Muthiah Mudaliar for Respondent.

N. S.

Devadoss, J. } C. R. P. No. 287 of 1927.
10th January, 1928.

Civil Procedure Code, Order 21, Rule 46—Attachment of kanom as moveable property—Validity.

Ordinarily a kanom does not include a personal undertaking to pay and consequently unless there is express personal undertaking in the deed the attachment of kanom as moveable property is not valid.

B. Sitaram Row for Petitioner.

P. Govinda Menon for Respondent.

N. S.

Kumarasami Sastri and *Devadoss, JJ.* } C. M. S. A. No. 85 of 1927.
11th January, 1928.

Limitation Act, Art. 11—Claim petition not pressed and withdrawn—Order if should be set aside within one year—Insolvency of judgment-debtor within 3 months of the attachment—Effect on the order in the claim petition.

Where a claim petition was not pressed and order was passed allowing it to be withdrawn the order need not be set aside within one year under Art. 11 of the Limitation Act. 41 M. 985 (F. B.), distinguished.

O. 21, R. 63, C. P. Code, applies only to orders in which there is adjudication on the merits or to orders rejecting the claim petition as being too late.

Where the judgment-debtor is adjudicated as insolvent within 3 months of the attachment, the attachment itself ceases to exist and the claim order becomes inoperative.

A. Srirangachari for Appellant.

K. S. Desikan for Respondent.

N. S.

Wallace and Srinivasa Aiyangar, JJ. } S. A. No. 684 of 1925.
12th January, 1928.

Contract Act, S. 74—Penal rate of interest award of compensation—Date from which the award can be made.

Under S. 74 of the Contract Act the Court has jurisdiction to award reasonable compensation in view of the penal rate of interest only

in respect of the portion of the contract which is sought to be enforced. But it has no jurisdiction to do so in so far as the portion of the contract which has already been performed is concerned.

P. Somasundram for Appellant.

G. Lakshmanna for Respondent.

N. S.

Waller, J.
16th January, 1928.

C. S. No. 705 of 1926.

Contract Act, S. 23—Contract for remuneration in lieu of invoking the blessings of God—Legality.

A contract by which the defendant agreed to pay a sum of money to the plaintiff by way of remuneration for the plaintiff performing pujah to God and invoking His blessings for the successful issue of a suit that had been instituted by the defendant is not supported by lawful consideration and amounts to bringing extraneous influence to bear upon the Court and thus affect the due administration of justice.

49 All. 785, distinguished.

R. Swaminatha Aiyar for Plaintiff.

K. Narasimha Aiyar for Defendant.

N. S.

Jackson and *Srinivasa Aiyangar, JJ.*
16th January, 1928.

S. A. No. 20 of 1925.

Jurisdiction—Civil Court—Suit to set aside sale of holding under Estates Lands Act by a mortgagee.

A suit in a civil Court by a mortgagee of a holding to set aside a sale of the holding held under the Estates Lands Act on the ground of absence of proclamation of sale and notice to the owner of the holding as well as fraud and other irregularities is maintainable.

35 Mad. 890 (F.B.), followed.

P. V. Ranga Ram for Appellant.

Ch. Raghava Rao for Respondent.

N. S.

Kumarasami Sastri and *Reilly, JJ.*
16th January, 1928.

A. S. No. 263 of 1923.

Civil Procedure Code, Order 2, Rule 2—Order on claim petition—Suit to set aside order—Possession delivered to auction-purchaser in execution of decree before institution of suit to set aside claim petition order—Suit if should include prayer for possession. C. P. Code, S. 11—Court of competent jurisdiction.

Where an order was passed on a claim petition dismissing it and before the claimant filed a suit to set aside the claim order the properties had been sold in execution and taken possession of by the purchaser the suit by the claimant to set aside the claim order without a prayer

for possession is maintainable, and a subsequent suit for recovery of possession is not barred by Order 2, Rule 2, C. P. Code, because the cause of action for such a suit is different from the cause of action for the suit under Order 21, Rule 63. Where the suit to set aside the claim order was filed in a Munsif's Court and the Court negatived the contention of the defendant that the claimant's purchase from the judgment-debtor was in fraud of creditors and in a subsequent suit in the Sub-Court for recovery of possession from the purchaser the purchaser raised the contention that the plaintiff's purchase was in fraud of creditors,

Held, that the decision in the prior suit on the point was not *res judicata* as the decision in the prior suit was by a Court not competent to try the subsequent suit.

V. Ramadoss for Appellant.

S. Varadachari for Respondent.

N. S.

Kumarasami Sastri and *Reilly, JJ.*
16th January, 1928.

A. S. No. 360 of 1923.

Registration Act, S. 40—Authority to adopt in favour of minor wife—Presentation for registration by the widow's father—Legality.

Where a document conferring an authority to adopt had been executed by a member of a joint Hindu family in favour of his minor wife and after his death the father of the minor widow presented it for registration.

Held, that he being the *de facto* guardian of the widow, was not entitled to present the document for registration and that the only persons who could present the document for presentation would be the legal guardians of the minor, namely the co-parceners of the deceased husband.

M. Patanjali Sastri for Appellant.

K. Krishnamachari for Respondent.

N. S.

Jackson, J.
17th January, 1928.

C. R. P. No. 130 of 1927.

Limitation Act, Art. 182—Step-in-aid of execution—Batta memorandum to issue process to judgment-debtor.

The presentation of a batta memorandum to issue process to the judgment-debtor is a step-in-aid of execution.

28 Mad. 399, followed.

K. S. Venkatarama Aiyar for Petitioner.

K. S. Sankara Aiyar for Respondent.

N. S.

Jackson, J.
17th January, 1928.

C. R. P. No. 775 of 1926.

Civil Procedure Code, S. 73 and Order 21, Rule 10—Assets realised by a Court—Application for rateable distribution

—Decree of applicant not transferred to the Court before the filing of the application—Right to rateable distribution.

The properties belonging to a judgment-debtor were sold in execution of a decree in the Sub-Court and the sale proceeds deposited in Court. A day prior to this deposit another decree-holder against the judgment-debtor on the file of the Munsif's Court applied in that Court for transmission of his decree to the Sub-Court, but the decree copy reached the Sub-Court one day later than the date on which the sale proceeds were deposited in that Court. Meantime the decree-holder in the Munsif's Court had applied in the Sub-Court for rateable distribution.

Held that he was not entitled to rateable distribution as no execution application had been filed in the Court which passed the decree or in the transferee Court after the decree was received by it by way of transfer.

M. Krishna Bharathi for Petitioner.

T. S. Anantharamier for Respondent.

N. S.

Phillips, Ramesam and *Madhavan Nair, JJ.* *17th January*, 1928. — I. P. No. 201 of 1919.

Insolvency—Adjudication of Hindu father as insolvent—Subsequent institution of partition suit by sons—Power of Official Assignee to sell the family properties to discharge the father's debts.

Held by Ramesam and Devadoss, JJ. (Phillips, J., dissenting) that the power of the Official Assignee to sell the joint family properties inclusive of the sons' shares in a case where the father has been adjudicated as insolvent cannot be exercised after the institution of a suit for partition of the family properties impleading the Official Assignee as a defendant.

K. S. Krishnasami Aiyangar for Official Assignee.

The Advocate-General for Insolvent's sons.

N. S.

Ramesam and Devadoss, JJ. *18th January*, 1928. — C. M. A. No. 340 of 1927.

Jurisdiction—Suit in foreign Court—Plaintiff in the suit a defendant in the suit in the Subordinate Court—Power of Subordinate Court to issue injunction restraining him from prosecuting the suit in the foreign Court.

A Subordinate Court has no jurisdiction to pass an order of injunction restraining a party before it from prosecuting a suit filed by him in a foreign Court. Even if the Subordinate Court had such power, it should not be granted unless it was clearly proved that the action of the foreign Court was oppressive or vexatious or the prosecution of it would defeat the ends of justice.

(1919) 1 K.B. 410, relied upon.

V. Ramasamy Aiyar for Appellant.

M. Patanjali Sastriar and N. R. Govindachary for Respondent.

N. S.

Wallace and Srinivasa Ayyangar, JJ. *18th January, 1928.* — S. A. No. 619 of 1925.

Hindu Law—Joint family—Alienation by co-parcener—Suit to set aside by another co-parcener—Right to impeach consideration.

A co-parcener who disputes the validity of alienation by another co-parcener in a suit brought by him to set aside the alienation is entitled to set up the plea that the alienation is not supported by consideration.

B. Somayya for Appellant.

C. Rama Rao for Respondent.

N. S.

Coutts Trotter, C.J. and Madhavan Nair, J. *18th January, 1928.* — L. P. A. No. 11 of 1925.

Mortgage—Prior and subsequent—Puisne mortgagee not impleaded in suit by prior mortgagee—Surplus sale proceeds in prior mortgagee's suit—Right of puisne mortgagee to proceed against.

In execution of a decree obtained in a suit by a prior mortgagee not impleading the puisne mortgagee as a party, the mortgaged property was sold and purchased by a stranger with the knowledge of the subsequent encumbrance. A money decree-holder against the mortgagor drew the surplus sale proceeds which were in Court deposit. The puisne mortgagee instituted a suit upon his mortgage and claimed that the surplus sale proceeds represented the mortgaged property sold, and therefore the money decree-holder should refund the amount drawn by him.

Held, that the puisne mortgagee even though he was not impleaded as a party in the prior mortgagee's suit was entitled to proceed against the surplus sale proceeds in the Court instead of proceeding against the property in the hands of the auction-purchaser.

18 Bom. 684 & 43 A. 268, followed.

41 I.A. 45 : 41 Cal. 654 : 26 M.L.J. 243 (P.C.) & 40 M. 77 : 30 M. L. J. 347, referred to.

Held also, that the appeal preferred by auction-purchaser to the High Court against the decree of the first Appellate Court, though the real aggrieved party was the puisne mortgagee, was maintainable inasmuch as the puisne mortgagee was also made a party in the appeal.

K. V. Krishnaswami Ayyar and *V. Rajagopala Ayyar* for Appellant.

S. Varadachariar and *T. Krishnaswami Ayyangar* for Respondent.

N. S.

Beasley, J. *18th January, 1928.* — C. S. No. 420 of 1926.

Defamation—Statement by wife of cruel treatment by husband—Statement that husband infected wife with gonorrhoea—Proof of special damage.

A libellous statement by the wife that her husband cruelly ill-treated her is not actionable without proof of special damage. But a

libellous statement that her husband infected her with gonorrhoea is actionable without proof of special damage.

The plaintiff in person.

G. Krishnaswami Ayyar for defendant.

N. S.

Ramesam and Devadoss, JJ.
20th January, 1928.

C. M. S. A. No. 8 of 1926.

Constructive Res-Judicata—*Applicability to execution proceedings.*

The doctrine of constructive *res judicata* applies to execution proceedings. Where a judgment-debtor after receiving notice of the application for transmission of the decree for execution to another court does not raise the plea of limitation and the decree is transmitted for execution, the judgment debtor is debarred from raising the plea at a later stage in the executive court.

47 Mad. 641 : 47 M.L.J. 4 & 1926 M. W. N. 336, referred to.

R. Krishnaswami Ayyangar for Appellant.

K. S. Ramabadhra Ayyar for Respondent.

N. S.

Jackson, J.
20th January, 1928.

C. R. P. No. 1041 of 1927.

Civil Procedure Code, Order VI, Rule 17—Amendment of plaint—Suit valued at Rs. 200—Finding by Court that value was Rs. 4 000 and consequently suit beyond the jurisdiction of Court—Application for amendment so as to bring suit within jurisdiction.

A suit was instituted in the Munsif'sCourt to recover possession of a house and other properties. The house was valued at Rs. 200. On objection by the defendant, the Court found the value of the house to be Rs. 4,000 and therefore the suit was beyond the jurisdiction of the Court. The plaintiff then put in an application to amend the plaint by deleting the relief as to the house. The District Munsif held that, though he had jurisdiction to allow the amendment, in the circumstances of the case amendment should not be allowed. On appeal, the lower appellate Court held that, once jurisdiction was found to exist, the Court was bound to allow the amendment.

Held (on Revision), that the Court had no jurisdiction to pass an order of amendment after the finding that it had no jurisdiction to entertain he plaint.

T. M. Krishnaswami Ayyar for Petitioner.

K. P. Mahadeva Ayyar for Respondent.

N. S.

Jackson, J.
20th January, 1928.

C. R. P. Nos. 1497 to 1499 of 1927.

Madras Estates Land Act—Summary suits under—Dismissal for default—Application for restoration.

The limitation for an application to restore a summary suit under the Estates Land Act which was dismissed for default is one month, the period fixed by Limitation Act.

V. Suryanarayana for Petitioner.

P. Somasundram for Respondent.

N. S.

Ramesam and Devadoss, JJ.
20th January, 1928.

C. M. S. A. No. 153 of 1927.

Provincial Insolvency Act, S. 17—Creditor's petition to adjudicate debtor as insolvent—Subsequent death of debtor before adjudication—Effect.

A petition filed by a creditor to adjudicate the debtor as an insolvent can after the death of the debtor before the adjudication be continued against the legal representative of the debtor. The fact that the debtor is not alive on the date of the order of adjudication is immaterial.

A fraudulent transfer by the debtor in favour of his sister's husband amounts to an act of bankruptcy.

53 M. L. J. 890, followed.

K. V. Krishnaswami Ayyar and *T. S. Vydhniadha Ayyar* for Appellant.

B. Sitarama Rao and *S. R. Muthuswami Ayyar* for Respondent.

N. S.

Phillips and Odgers, JJ.
23rd January, 1928.

A. S. No. 162 of 1924.

Civil Procedure Code, S. 64—Contract for sale by judgment-debtor—Subsequent attachment of properties—Subsequent sale in prusuance of the prior contract of sale—Validity—Attachment if fastens on the sale price—C. P. Code., S. 47 and Order 21, R. 63—Simple money decree—Transferee of immoveable property from judgment-debtor—If representative of judgment-debtor— Appeal against adverse order on claim petition by him—Maintainability.

Where an attachment of immoveable property is effected subsequent to a contract for the sale of the property by the judgment-debtor, S. 64, C. P. Code, does not avoid a sale thereafter in pursuance of the prior contract for sale.

5 L. W. 234, followed.

Where there is an attachment of immoveable property and a subsequent valid sale of the property in pursuance of the prior contract of sale, the attachment does not *ipso facto* fasten itself under S. 64, C.P. Code, on the sale price payable to the vendor (judgment-debtor) solely by reason of the price being the substitute for the land attached.

Where there is a simple money decree having no reference to any specific immoveable property of the judgment-debtor, the transferee of the immoveable property from the judgment-debtor is not a representative of the judgment-debtor under S. 47, C. P. Code, and, therefore, the transferee cannot prefer any appeal against an adverse order on a claim petition filed by him to release the property from attachment. His only remedy is a suit under Order 21, R. 63, C. P. Code.

T. M. Krishnaswami Ayyar and *N. Sivaramakrishna Ayyar* for Appellant.

K. V. Sesha Ayyangar and *K. R. Narayana Ayyar* for Respondent.

N. S.

Wallace and Srinivasa Ayyangar, JJ.
24th January, 1928.

S. A. No. 579 of 1925.

Damages—Principal and Agent—Wrongful sale of goods entrusted to agent for disposal—Measure of damages.

Where a principal brought a suit for damages against the agent on the ground that the agent who was entrusted with the goods for sale sold them without taking instructions from the principal and thereby converted them to his own use.

Held, that the agent was not liable to pay for the goods at the highest market rate prevailing before the institution of the suit which would be the proper measure of damages, if the goods were not ordinary merchandise, but other things like pictures, &c., but the proper measure of damages, the goods being jaggery, must be fixed on the basis of the market rate prevailing a week after the date of knowledge of sale by the plaintiff.

G. Lakshmanna for Appellant.

P. Somasundaram for Respondent.

N. S.

Ramesam and Reilly, JJ.
27th January, 1928.

A. S. No. 129 of 1923.

Hindu Law—Joint family—Self acquisition—Property acquired on dharkast*—Absence of nucleus—Burden of proof—Words " acquired by me "—Meaning of.*

Where there is no ancestral nucleus, the onus of proving that properties standing in the name of a member of a joint Hindu family are not his self acquired properties lies on the party asserting that it is not self acquired, however difficult it may be to prove the same.

9 M. 477, dist.

Where a Hindu family consisting of a great grandfather, grandfather, father and sons were all living together and attending to the cultivation of lands and the family affairs, and lands were acquired by the great grandfather on *dharkast*.

Held, that these lands were the self acquired properties of the great gradfather and did not become joint family properties. The words " acquired by me " in a document executed by a senior member of a joint Hindu family mean only that the particular properties were acquired during the period of his management and not necessarily that these properties were his self acquisitions.

S. Varadachariar and *C. Unikanda Menon* for Appellant.

T. M. Krishnaswami Ayyar and *N. Sivaramakrishna Ayyar* for Respondent.

N. S.

Wallace and Srinivasa Ayyangar, JJ. } L. P. A. No. 227 of 1925.
25th January, 1928.

Madras Estates Land Act, S. 151—*Lease by the ryot for building purposes.*

The mere fact that the ryot has executed leases of the land in his holding for building purposes is no ground to eject the ryot under S 151. But, if the lessee has erected a building on the holding, it amounts to a material impairing of the holding for agricultural purposes within S. 151.

P. V. Rangaram for Appellant.

A. Krishnaswami Ayyar for Respondent.

N. S.

Wallace and Srinivasa Aiyangar, JJ. } S. A. Nos. 445 and 446 of 1925.
27th January, 1928.

Minor—Guardian—Contract by, to sell minor's immovable property—Specific performance.

A contract entered into by the guardian of a Hindu minor cannot be specifically enforced against the minor.

L. P. A 67 of 1924, followed.

S. Varadachariar and *V. Krishnamohan* for Appellant.

C. S. Venkatachari and *A. Venkatachalam* for Respondent.

N. S.

Ramesam and Devadoss, JJ. } C. M. S. A. No. 37 of 1927.
1st February, 1928.

Limitation Act, S. 15—*Four judgment-debtors—Stay of execution in favour of one—If saves limitation as against the others—Provincial Insolvency Act—Order of adjudication—If operates as a stay of execution.*

The period of stay of execution against one judgment-debtor does not save limitation in respect of execution as against the other debtors.

13 Law Weekly 59, not followed.

Quaere: Whether the insolvency of the judgment-debtor operates as stay of execution so as to enable the decree-holder to exclude the period under S. 15 of the Limitation Act.

The Advocate-General for Appellant.

B. Sitarama Rao and *N. R. Sesha Ayyar* for Respondent.

N. S.

Wallace. J. } Crl. A. No. 405 of 1927.
2nd February, 1928.

Madras Local Boards Act, Ss. 24 *and* 223—*Power of President to authorise anybody to prefer complaint.*

S. 223 of the Madras Local Boards Act is not qualified by S. 24. The President has power to authorise anybody to prefer a complaint, but the power must be expressed and filed along with the complaint.

S. Parthasarathy and *V. K. Thiruvenkatachari* for Accused.

N R C

The Public Prosecutor for the Crown.

P. Govinda Menon, Amicus Curiae.

N. S.

The Chief Justice, Beasley and Madhavan Nair, JJ.
2nd February, 1928. } R. C. No. 5 of 1927.

Indian Income-tax Act, S. 4 (3) (1)—Sums entered in the accounts in the name of charity—Whether property held under trust—Income from it—Whether an allowable deduction.

Where a fund was set apart for the purposes of a particular trust and so entered in the accounts of the assessee and treated as trust fund for several years by the income-tax authorities, though there was no registered trust deed.

Held, that it was not property held under trust or other legal obligation for religious or charitable purposes and the income from it is not exempt from assessment.

V. Rajagopala Aiyar for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

N. S.

Devadoss, J.
6th February, 1928. } C. R. P. No. 459 of 1926.

Civil Procedure Code, S. 20 (c)—Cause of action—Execution of hundis at one place and sending them to another place—Suit on hundi at the latter place.

Where the contract between the parties was that the defendants were to execute the hundis and send them to Palghat where the plaintiff resided, the delivery of the hundi at Palghat is a part of the cause of action and consequently a suit on the hundi at Palghat is maintainable.

1 M. H. C. R. 202, followed.

B. Sitarama Rao for Petitioner.

K. S. Desikan for Respondent.

N. S.

Devadoss, J.
6th February, 1928. } C. R. P. No. 215 of 1927.

Provincial Insolvency Act, S. 53—Failure of creditors to prove debts—Sufficient assets in the hands of the Receiver to pay the proved debts—Application under the Section—Maintainability

Where certain creditors of an insolvent whose estate was administered in a summary manner failed to prove their debts within the time allowed and their petition to extend the time for proving their debts was rejected and the Official Receiver had sufficient assets at his disposal for payment in full of debts which had been proved :

Held, that the Official Receiver could not maintain proceedings under S. 53 of the Provincial Insolvency Act for setting aside an alienation made by the insolvent as there were no creditors for whose sake it could be or had to be done.

B. Satyanarayana, for Petitioner.

V. Govindarajachari for Respondent.

N. S.

Phillips and Odgers, JJ.
6th February, 1928.

A. S. No. 90 of 1924.

Hindu Law—Will giving authority to adopt to widow—Suit for declaration that the will is a fabrication—Finding that the will is genuine—Declaration that will invalid on the ground of its not being registered—If can be given.

Where a Hindu reversioner sued for a declaration that a certain unregistered will alleged to have been executed by the last male owner giving his widow authority to adopt was a fabrication and it was found that the will was genuine but that the testator was a minor when he executed it :

Held, that the plaintiff was not entitled to a declaration that the will was invalid even if genuine on the ground that it contained an authority to adopt and was therefore compulsorily registrable.

52 I.A. 305 : 48 Mad. 614 : 49 M. L. J. 247 (P. C.), referred to.

G. Lakshmanna and *P. Satyanarayanarao* for Appellant.

A. Krishnaswami Ayyar and *V. Govindarajachari* for Respondents.

N. S.

Ramesam and Jackson, JJ.
7th February, 1928.

C. M. S. A. Nos. 96 and 97 of 1925.

Civil Procedure Code, O. 40, R. 1—Order appointing receiver in execution—Second appeal—Maintainability.

An order appointing or refusing to appoint a receiver in execution of a decree is one within the scope of Order 40, R. 1, C. P. Code, and consequently no second appeal lies from such an order.

14 C. L. J. 489, referred to.

B. Sitarama Rao for Petitioner.

K. Kuttikrishna Menon for Respondent.

N. S.

Kumaraswami Sastri and Devadoss, JJ.
8th February, 1928.

C. M. S. A. No. 6 of 1927.

Minor—Pronote executed by guardian—Decree on—Minor represented by executant as guardian ad litem*—Validity of decree—Void or voidable—Plea of—If can be raised in execution.*

The following questions were referred to a Full Bench :

(1) Whether in a suit upon a promissory note against a minor a decree obtained against him represented by the executant as the guardian *ad litem* is invalid or not.

(2) Whether a decree passed against a minor who is represented by a guardian whose interests are adverse to that of the minor is void or voidable.

(3) Whether in execution of such a decree the plea of the invalidity of the decree can be taken.

G. Lakshmanna for Appellant.

V. Viyanna for Respondent.

N. S.

The Chief Justice, Beasley and Madhavan Nair, JJ.
9th February, 1928.

C. R. P. No. 1216 of 1925.

Civil Procedure Code, O. 22, R. 3—Suit on mortgage—Preliminary decree—Death of plaintiff subsequent to—Abatement.

Where a decree-holder in a mortgage suit dies subsequent to the passing of the preliminary decree, the suit does not abate even though the legal representatives are not brought on record within the period allowed by the law of limitation.

45 M. 872=42 M.L.J. 301, overruled.

S. Varadachariar and *B. V. Visvanatha Iyer* for *N. Swaminathan* for Petitioner.

C. S. Venkatachariar for *P. N. Appuswami* for Respondent.

N. S.

Wallace and Srinivasa Aiyangar, JJ.
30th January, 1928.
S. A. No. 1462 of 1924.

Malabar Law—Tiyyas of Calicut—Law applicable to—Right of compulsory partition if exists—Custom—If Hindu Law applies.

Some of the members of a Makkathayam Tiyya family of Calicut filed a suit for a declaration that the attachment and sale of the share of another member of the family in the family property was illegal as there was no right of compulsory partition and the question arose whether among the Tiyyas of Calicut the right of compulsory partition exists.

The District Judge of South Malabar called for a finding from the Munsif as to whether the custom existed and the Munsif returned a finding on the facts that there was this custom of compulsory partition. The District Judge held on the evidence the right of compulsory partition did not exist and no custom has been made out and following the ruling in 17 Mad. 184 held that the plaintiffs are entitled to a decree.

In second appeal their Lordships held following 17 Mad. 184 that no custom as to the right of compulsory partition has been made out and accepted the finding of the lower court.

Per Wallace, J.—In the absence of any special custom the Hindu Law will be applicable to the parties and the principles in 53 M. L. J. 368 will therefore be applicable.

Per Srinivasa Aiyangar, J.—As the decision in 17 Mad. 184 is still good law the decision in 53 M. L. J. 368 requires reconsideration.

Dr. S. Swaminathan for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

N. S.

Phillips and Odgers, JJ.
8th February, 1928.
Appeal No. 170 of 1925.

T. P. Amendment Act (XXVII of 1926)—If retrospective.

T. P. Amendment Act (XXVII of 1926) does not govern a mortgage executed before the Act came into force.

Cases on the subject discussed.

G. Krishnaswami Aiyar and *A. Parameswara Aiyar* for Appellant.

S. Varadachariar and *N. R. Govindachari* for Respondent.

N. S.

Phillips and Odgers, JJ.
13th February, 1928.
A. S. Nos. 115 and 116 of 1924.

Hindu Law—Right of maintenance of wife against her husband and his family—Charge on family property—Rate of maintenance.

Where a Hindu wife claimed separate maintenance against her husband and against the property of the joint family of which he is a member, on account of gross cruelty and ill-treatment in her husband's family, and also a charge against the joint family property and she claimed at the rate of Rs. 30 per month for maintenance when the family income

N. R. C.

was about Rs. 2,500 per month and there were only three sharers in the joint family,

Held, (1) that the wife was entitled to separate maintenance, gross cruelty in her husband's family being proved,

(2) that she was also entitled to a charge for her maintenance on her husband's share in the joint family property as the claim for maintenance is not merely a personal claim but is also a claim against the property in the joint family.

9 B. H. C. 283, 21 L. W. 461, and 39 M. L. T. 212, followed.

and (3) that as the defendant failed to produce the account or to prove the family income and as there was evidence that the family income was not less than Rs. 2,500 per month a rate of Rs. 30 per month was a proper one considering the status and position of the family.

B. Sitarama Rao and *P.S. Narayanaswami Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *K. P. Ramakrishna Aiyar* for Respondent.

N. S.

Wallace, J.
14th February, 1928. } C. R. P. No. 121 of 1928.

Civil Procedure Code, S. 115—Election proceedings—Validity of a vote—Power of High Court to decide in revision.

In an election petition questioning the validity of an election on the ground that the returning officer improperly rejected three votes as invalid, the Subordinate Judge held that the votes were not invalid but ought to have been counted in favour of the defeated candidate and consequently declared him to be duly elected.

Held, (on revision) that the " High Court will not decide in revision whether a vote was or was not valid but only whether the lower court exercised its jurisdiction properly."

49 M. L. J. 381, followed.

A. Sundaram for Petitioner.

S. Jagadisa Aiyar for Respondent.

N. S.

Ramesam and Jackson, JJ.
14th February, 1928. } C. R. P. No. 535 of 1926.

Limitation Act, Art. 96—Claim for refund of surcharges wrongly collected by Railway Company.

The period of limitation for the recovery of amounts said to have been wrongly collected by Railway Company as surcharge in respect of consignment of cotton seeds is 3 years from the date of the respective payments.

Art. 96 of the Limitation Act contemplates cases of mistake of law, but the mistake must be a mistake not of a general law but of a particular law applicable to a particular case.

R. Srinivasa Aiyangar for Petitioner.

The Advocate-General for Government.

S. S. Ramachandra Aiyar for Railway Company.

N. S.

Wallace, J.
15th February, 1928. } C. R. P. No. 185 of 1927.

Malabar Law—Suit to recover Paravasi—*Nature of suit—If cognizable by the Small Cause Court.*

Under Malabar Law the term *Paravasi* means an excess or deficit in measurement of paddy. Suit to recover *paravasi* is one to enforce a charge on the immoveable property and is not cognizable by the Small Cause Court.

K. P. Ramakrishna Aiyar and *K. C. Cheria Kunhunni Raja* for Petitioner.

M. Eachara Menon for Respondent.

N. S.

Thiruvenkatachariar, J.
15th February, 1928. } C. R. P. No. 282 of 1927.

Civil Procedure Code, S. 115—*Order declaring defendant* ex parte—*Application to set aside the order—Order dismissing—Revision—Interference.*

The High Court will not interfere in revision against an order dismissing an application to set aside an order declaring a defendant *ex parte*, as the petitioner might have applied under O. 9, R. 13 to set aside the *ex parte* decree or preferred an appeal against the *ex parte* decree.

T. L. Venkatrama Aiyar for Petitioner.

A. C. Sampath Aiyangar for Respondent.

N. S.

Wallace, J.
15th February, 1928. } Crl. A. No. 650 of 1927.

Criminal Procedure Code, Ss. 181 *and 183—Entrustment of goods to carrier at Mysore—Goods to be delivered at Mangalore—Misappropriation of part of the goods—Prosecution at Mangalore—Jurisdiction of Court.*

A cart-driver was entrusted at Mysore with goods to be delivered at Mangalore. Part of the goods was misappropriated and the rest only was delivered at Mangalore. The evidence did not show at what place the misappropriation took place. He was charged for criminal breach of trust at Mangalore.

Held, that S. 183 of the Crl. P. Code was not applicable as there was no proof that the offence took place in British India, but S. 181 (2) applied as the offence could be deemed to have been committed at Mangalore where the breach of trust to deliver took place.

The Public Prosecutor for the Crown.

D. A. Krishna Warriar for Accused.

N. S.

Ramesam and Jackson, JJ. } C. M. A. No. 88 of 1925.
16th February, 1928.

Assignment of decree—Plea that assignment was benami *on behalf of judgment-debtor—Onus of proof.*

The onus of proving that assignment of the decree was *benami* on behalf of one of the judgment-debtors is on the judgment-debtor.

B. Somayya for Appellant.

A. Krishnaswmi Aiyar for Respondent.

N. S.

Ramesam and Devadoss, JJ. } C. M. S. A. No. 134 of 1926.
16th February, 1928.

Civil Procedure Code, O. 21, R. 52—Raising of attachment—Pending execution application—Necessity of.

If an attachment is to be raised under O. 21, R. 52, there must be a proper and pending execution application so as to attract the operation of the rule.

Where an execution application is returned as not in accordance with law and for some particulars to be given, there cannot be said to be any execution application pending in the Court.

A. Swaminatha Aiyar for Appellant.

M. S. Venkatarama Aiyar for Respondent.

N. S.

Ramesam and Devadoss, JJ. } C. M. A. No. 370 of 1927.
17th February, 1928.

Civil Procedure Code, Ss. 37 and 150—Transfer of territorial jurisdiction by Government notification subsequent to institution of suit—Jurisdiction of Court which passed the decree to execute the decree—Res judicata—*Failure to object to the jurisdiction of the transferee Court to execute the decree—If precludes the judgment-debtor from raising the objection later—C. P. Code, S. 21—Applicability to execution proceedings.*

A suit was instituted in the Negapatam Sub-Court and, subsequent to the institution, the territorial jurisdiction was transferred by notification of Government to the Tanjote Sub Court. The suit was tried by the Negapatam Sub-Court and a decree was passed. An execution application was filed in the Tanjore Sub-Court and, the judment-debtors being *ex parte*, an order for sale was passed. Before the date fixed for sale, an alienee from the judgment-debtor put in an objection to the jurisdiction of the Tanjore Sub-Court to execute the decree.

Held, (1) that the only Court which had jurisdiction to execute the decree was the Negapatam Sub-Court which passed the decree, even though it had lost territorial jurisdiction at the time when the execution application was filed ; and the Tanjore Sub-Court had no jurisdiction to execute the decree without the decree being transferred to it for execution.

Case-law reviewed.

(2) That the prior order settling the sale proclamation would not amount to *res judicata*, as the order was not passed by a competent Court, the Tanjore Sub-Court not being competent to entertain the execution application, and

(3) that S. 21, C. P. Code, was not applicable to execution proceedings and consequently the plea of want of jurisdiction could be taken at a late stage.

K. S. Jayarama Aiyar for Appellant.

K. Bhasyam Aiyangar for Respondent.

N. S.

Kumaraswami Sastri and Devadoss, JJ.
20th February, 1928.

S. A. No. 720 of 1925.

Contribution—Joint decree-holders—Execution application by one on behalf of all—Payment of amount to applicant out of Court—Arrangement that the amount was to be adjusted towards the share of the applicant—Right of the other decree-holders to contribution.

A joint decree was passed on a mortgage in favour of two persons. One of them put in an execution application on behalf of both. The judgment-debtor paid a certain amount to the applicant out of Court and the execution petition was allowed to be dismissed. The other decree-holder sued this decree-holder to recover his share of the amount received by him from the judgment-debtor. The defendant contested the claim on two grounds, *viz.*, (1) that the amount, having been collected out of Court, could not be said to have been recovered in execution so as to entitle the plaintiff to contribution, and (2) that the amount was paid as the share due to the defendant exclusively in respect of the joint decree.

Held, that the amount, though paid out of Court, was paid by virtue of, and during the pendency of, the execution application taken on behalf of both the decree-holders, and consequently the plaintiff was entitled to contribution, and the defendant, even assuming there was an arrangement that the amount should be adjusted towards his share of the decree amount, was not entitled to appropriate the amount exclusively for himself.

Held also, that the defendant when he received the amount, could not be said to be a trustee for the plaintiff and consequently the plaintiff was not entitled to interest, in the absence of a demand prior to the date of the suit.

M. Patanjali Sastri for Appellant.

R. Kesava Aiyangar for Respondent.

N. S.

Kumaraswami Sastri and Reilly, JJ.
20th February, 1928.

S. A. No. 1752 of 1925.

Hindu Law—Joint family—Alienation by manager—Portion of the consideration for necessary purposes—Decree—Charge on the shares of persons other than the alienor.

In the case of an alienation by the manager of a joint Hindu family where a portion of the consideration only is for necessary and binding purposes,

(i) if the portion is grossly inadequate having regard to the share of the alienor himself, the entire sale is really a gift in the guise of a sale and consequently will not be valid even to the extent of the alienor's share.

27 M. 162, followed.

(ii) if the value of the alienor's share could be sufficient to cover the binding portion of the consideration, the alienee will be entitled to have the sale enforced in respect of the alienor's share but he will not be entitled to a charge over the other coparceners' shares for their proportionate share of the binding consideration.

23 M. 89, referred to.

(iii) if the binding portion of the consideration is more than the value of the alienor's share, the alienee will be entitled to get the alienor's share in the properties and also to have a charge over the other coparceners' shares in respect of the portion of the consideration not covered by the alienor's share.

37 M. 438, dissented from.

S. Varadachariar and *P. N. Appuswami Aiyar* for Appellant.

T. L. Venkatrama Aiyar for Respondent.

N. S. ———

Waller, J.
21*st February*, 1928. } C. M. S. A. Nos. 49 and 62 of 1925.

Limitation Act, S. 18—Execution sale—Application to set aside for fraud—Fraud of decree-holder only—Absence of fraud on the part of the auction purchaser—C. P. Code, O. 21, R. 90.

An execution sale can be set aside for fraud on the part of the decree-holder in spite of the *bona fides* on the part of the auction purchaser. An application to set aside an execution sale filed beyond thirty days is not barred by limitation if fraud on the part of the decree-holder is proved, even though there is no fraud on the part of the auction purchaser

K. Bhasyam Aiyangar and *A. V. Visvanatha Sastri* for Appellant.

K. S. Krishnaswami Aiyangar and *K. S. Champakesa Aiyangar* for Respondent.

N. S. ———

Wallace, J.
21*st February*, 1928. } C. R. P. No. 633 of 1927.

Evidence Act, S. 92—Pro-note executed by two persons—Recovery of the amount from one of them—Suit for contribution against the other—Plea that defendant was only a surety—Admissibility of oral evidence as to.

The amount due on a pro-note executed by two persons was collected from one of them and the latter sued the other executant of the pro-note for contribution. The defendant pleaded that he was only a

surety. The plaintiff contended that oral evidence was not admissible to prove that the defendant was only a surety as he had joined in the execution of the note as co-executant.

Held, that the defendant would be precluded from proving by oral evidence that he was a surety *only* in a suit upon the note by the payee, but in a suit for contribution by the other executant he can prove by oral evidence that he was only a surety as it would not be contradicting the terms of the note, the note being silent as to the relations of the co-executants *inter se*. The words "parties to the instrument" in S. 92 of the Evidence Act mean parties arranged on opposite sides and not parties on the same side.

10 All. 421, referred to.

K. P. Ramakrishna Aiyar for Petitioner.

N. Swaminathan for Respondent.

N. S.

Wallace, J.
23rd February, 1928. } Crl. R. C. Nos. 385, etc., of 1927.

Madras Local Boards Act, S. 221—License not taken out—Prosecution not launched—Right to recover license fees.

A Taluk Board has no power to recover license fees from any person to whom a license has not been granted. The proper remedy was to launch a prosecution for failure to take out the license and a Taluk Board by their failure to launch a prosecution cannot be said to have impliedly granted a license.

Crl. Rev. Case 784 of 1927, followed.

N. R. Govindachari for Petitioner.

The Public Prosecutor for the Crown.

N. S.

Phillips and *Odgers, JJ.*
27th February, 1928. } A. S. No. 108 of 1924.

Mortgage—Suit on prior mortgage—Puisne mortgagee not impleaded—Decree and execution sale—Subsequent suit by the puisne mortgagee on his mortgage—Right of auction purchaser in the first mortgagee's suit to hold up the prior mortgage as a shield and claim priority.

A suit was instituted on a prior mortgage without impleading the puisne mortgagee as a party and the properties were sold in auction in execution of the decree obtained in the suit. Subsequently the puisne mortgagee instituted a suit on his mortgage impleading the court auction purchaser in the prior mortgagee's suit as a party. The auction purchaser claimed to set up the prior mortgagee's rights as a shield.

Held, that the auction purchaser was entitled to hold up the prior mortgage as a shield and claim priority in respect thereof.

41 M. L. J. 399, followed.

Held also, that no question of limitation arose, as the prior mortgage was only used as a shield.

52 M. L. J. 532, doubted.

B. Somayya for Appellant.

T. V. Muthukrishna Aiyar for Respondent.

N. S.

Jackson, J.
28th February, 1928. } C. R. P. No. 303 of 1926.

Village Court's Act, S. 73—Illegal decision of the Panchayat Court—Reversal of—Validity.

A District Munsif reversed the decision of the Village Court on the ground that the decision was opposed to law although it was not unjust.

Held, that the District Munsif was entitled to do so and the High Court will not interfere in revision.

K. Kuttikrishna Menon for Petitioner.

K. P. Ramakrishna Aiyar for Respondent.

N. S.

Kumaraswami Sastri and *Reilly, JJ.*
28th February, 1928. } S. A. Nos. 1075 and 1076 of 1925.

Limitation Act, Arts. 120, 134, 142 *and* 144—*Trust properties—Alienation by the members of mutawalli's family—Suit by worshippers to recover possession of—Limitation.*

The period of limitation for a suit by the worshippers of a mosque to recover possession of the properties belonging to the mosque which had been improperly alienated by the members of the mutawalli family is 12 years under Art. 134 or 142 or 144 and not 6 years under Art. 120

41 M. 124=33 M.L.J. 357, referred to.

V. V. Srinivasa Aiyangar for Appellant.

K. Bhasyam Aiyangar for Respondent.

N. S.

Phillips and Devadoss, JJ. *27th February*, 1928.	A. S. No. 150 of 1924.

T. P. Act, S. 95—Prior and puisne mortgagees—Purchase of one of the items by the puisne mortgagee—Subsequent taking of assignment of prior mortgage by puisne mortgagee—Effect.

Two properties were successively mortgaged to two persons and subsequently one of the properties was mortgaged to another. The latter purchased the equity of redemption in respect of his mortgaged property and subsequently took an assignment of the two prior encumbrances.

Held, that the plaintiff was in the position of a co-mortgagor redeeming the entire property by virtue of his purchase of the equity of redemption and the assignment of the prior mortgages would not confer on him a right to enforce them as mortgagee but that his right was only a right of contribution under S. 95 of the T. P. Act.

T. M. Krishnaswami Aiyar for Appellant.

K. S. Krishnaswami Aiyangar for Respondent.

N. S.

Ramesam and Thiruvenkata Achariar, JJ. *27th February*, 1928.	S. A. No. 253 of 1928.

Hindu Law—Joint family—Alienation by father—Void or voidable—Right of after-born son to question.

An alienation of the joint family properties by the father for purposes not binding on the family is void and not voidable.

35 M. 177=20 M. L. J. 371, followed.

A son born after an alienation made by the father can question that alienation as having been made for purposes not binding on the family, even though the alienation was left unquestioned by the other co-parceners.

K. S. Champakesa Aiyangar for Appellant.

N. S.

Ramesam and Devadoss, JJ. *28th February*, 1928.	L. P. A. No. 79 of 1927.

Religious Endowment—Temple—Archaka in management—Absence of trustees—Right of archaka to sue trespasser

In the absence of regularly recognised dharmakartas or trustees, the archaka in management of a temple is entitled to bring a suit for recovery of temple property from a trespasser.

T. R. Ramachandra Aiyar for Appellant.

B. Satyanarayana for Respondent.

N. S.

Waller, J. *28th February*, 1928.	C. S. No. 327 of 1927.

Pensions Act, Ss. 4 and 6—Dismissed Government servant—Suit against Government for pension—Maintainability.

N. R. C.

A Government servant whose services were dispensed with as the department in which he was engaged was closed cannot institute a suit in a Civil Court against the Government for the recovery of damages for the witholding of pension. The Civil Court has no jurisdiction to pass any order affecting the liability of the Government to pay pension.

N. S. Srinivasa Aiyar for the Plaintiff.

The Advocate-General for the Gvernment.

N. S.

Devadoss and Jackson, JJ. *29th February, 1928.* — C. M. A No. 539 of 1925 and C. R. P. No. 1324 of 1925.

Civil Procedure Code, S. 92—Scheme decree—Provision for application for alteration or modification of the scheme—Application for fixing remuneration of archaka and determination of the amount to be spent on festivals—Maintainability.

Provision was made in a scheme decree for the filing of applications for carrying out the directions of the scheme and for alteration of its terms. In prursuance of this, an application was made for fixing the remuneration of the archaka and for the determination of the amounts to be spent by the trustees for certain festivals and an order was passed fixing the amounts.

Held, that the order of the lower court was without jurisdiction, as the provision in the scheme decree for the application was *ultra vires.* 53 M. L. J. 792 (F. B.), followed.

B. Somayya for Appellant.

G. Lakshmanna and *K. Ramamurthi* for Respondent.

N. S.

Devadoss and Jackson, JJ. *29th February, 1928.* — S. R. Nos. 7968, 7971 and 7974 of 1927.

Land Acquisition Act, S. 54—Award—Claims of rival parties—No dispute as to the amount—Appeal—Forum—court-fees—Court Fees Act, S. 8, and Sch. I, Art. I.

In a land acquisition case, the amount of the award was claimed wholly by the inamdar on the ground that he was the full owner of the acquired lands while the tenants claimed a portion of it on the ground that they owned the kudivaram right in the lands. The Subordinate Judge decided this question in favour of the inamdar. The tenants preferred an appeal to the High Court.

Held, (1) that S. 54 of the Land Acquisition Act did not apply to the case as the dispute related to the rival claims of the parties to the amount of the award, and not to the amount of the award itself, but that the decision of the Subordinate Judge was a "decree" from which an appeal would lie under S. 96 of the C. P. Code, and, as the value of the subject matter in dispute was not more than Rs. 3,000, the appeal lay to the District Court and not to the High Court,

and (2) that the amount of the court-fee payable was *ad valorem* on the value of the amount involved under Art. 1 of Sch. I of the Court Fees Act.

V. Narayanan for Appellant.

S. Muthiah Mudaliar for inamdar.

The Government Pleader for the Government.

N. S.

Thiruvenkata Achariar, J.
1st March, 1928. } C. R. P. No. 621 of 1926.

Civil Procedure Code, S. 47—Maintenance decree—Charge on properties—Subsequent sale of the properties—Execution application—Order on—Appeal — Revision — Memo. of objections in—Maintainability.

A decree for maintenance was passed creating a charge on the properties. The properties were alienated by the judgment-debtor subsequent to the decree. The decree-holder filed an execution application for attachment of crops and the same was dismissed. He filed a Civil Revision Petition.

Held, (1) that the C. R. P. was not maintainable, as an appeal lay under S. 47, C. P. Code, against the order disallowing execution, the purchaser from the judgment-debtor being the representative in interest of the judgment-debtor,

and (2) that as the C. R. P. was not competent, the memo. of objections in it was also not competent.

Obiter: A memo. of objections can be filed in a Civil Revision Petition.

D. Ramasami Aiyangar for Petitioner.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Respondent.

N. S.

Phillips and Odgers, JJ.
5th March, 1928. } A. S. No. 136 of 1924.

Limitation Act, Art. 120—Temple property—Mortgage of, by trustee—Suit by worshipper for declaration that mortgage is not binding on the trust—Starting point of limitation.

The trustee of a temple created a mortgage, and one of the worshippers brought a suit for declaration that the mortgage was not binding on the trust on the ground that the defendant set up a fraudulent title in himself to the detriment of the trust.

Held, that the period of limitation for the suit was 6 years and limitation commenced to run *not* from the date of the mortgage but from the date when the plaintiff came to know of the mortgage.

33 M. 31, distinguished.

V. V. Srinivasa Aiyangar, A. Krishnasami Aiyar and *K. Desikachari* for Appellant.

P. R. Ganapati Aiyar and *V. Krishna Mohan* for Respondent.

N. S.

Thiruvenkata Achariar, J.
6th March, 1928. } C. R. P. No. 180 of 1927.

Civil Procedure Code, O. 21, R. 89—Sale of insolvent's property—Purchase by decree-holder—Application by Official Receiver to set aside sale—Deposit of decree amount—Official Receiver's right to claim the amount—Provincial Insolvency Act, Ss. 51 and 52.

N R C

The insolvent's property was sold in court auction in execution of a decree against him and the Official Receiver put in an application under O. 21, R. 89, C. P. C, to set aside the sale on depositing the decree amount. The Official Receiver further claimed that, on the setting aside of the sale, the decree-holder purchaser was not entitled to the amount but he was the person entitled under Ss. 51 and 52 of the Provincial Insolvency Act.

Held, that the amount deposited into Court was "assets realised in execution" within the meaning of S. 51 of the Provincial Insolvency Act and the decree-holder was entitled to it.

T. S. Anantaraman for Petitioner.

V. N. Shama Rao for Respondent.

N. S.

Thiruvenkata Achariar, J.
6th March, 1928. } C. R. P. No. 408 of 1926.

Provincial Small Cause Courts Act, Art. 31—Suit for profits of immoveable property—Suit for damages for wrongful tapping of cocoanut trees.

A suit for damages on the ground that the defendant trespassed into the plaintiff's land and tapped toddy from two cocoanut trees belonging to him is not a suit for profits of immoveable property within the meaning of Art. 31 of the Provincial Small Cause Courts Act, but a suit for compensation for trespass upon immoveable property.

35 M. 726=21 M. L. J. 442, referred to.

A. Seshachari for *K. Krishnaswami Aiyangar* for Petitioner.

Respondent unrepresented.

N. S.

Phillips and Devadoss, JJ.
7th March, 1928. } A. S. No. 96 of 1924.

Civil Procedure Code, O. 38, Rr. 8 and 9—Attachment before judgment—Dismissal of suit for default—Attachment, if terminates ipso facto*—Order of Court—Necessity of—Subsequent restoration of suit—Effect.*

An attachment before judgment does not terminate *ipso facto* on the dismissal of the suit in which it was made. There must be an express order of court cancelling the attachment.

Where an order of attachment before judgment was made in a suit and subsequently the suit was dismissed for default but no order was made by the Court cancelling the attachment, and subsequently the suit was restored to file.

Held, that the attachment did not come to an end on the dismissal of the suit but continued to have effect, as the effect of the restoration was to revive all interlocutory orders passed up to the stage when the suit was dismissed.

C. S. Venkatachariar for Appellant.

T. M. Krishnaswami Aiyar for *S. S. Ramachandra Aiyar* and *T. S. Anantaraman* for Respondent.

N. S.

Waller and Madhavan Nair, JJ.
8th March, 1928.
L. P. A. No. 34 of 1924.

Temple Committee—Suspension of pujaris of temple—Absence of intention of trustee—Effect.

Where a temple is managed by trustees, the temple committee has no power to pass any direct orders, such as orders of suspension, relating to the temple servants, but can only act through the trustees.

K. R. Rangasawmi Aiyangar and *Salem Ramasawmi Aiyar* for Appellant.

S. T. Srinivasagopalachari for Respondent.

N. S.

Devadoss and Jackson, JJ.
9th March, 1928.
C. M. A. No. 523 of 1925.

Provincial Insolvency Act, S. 9—Creditor's application to adjudicate the debtor as insolvent—Application filed after three months—Jurisdiction of Court to excuse delay—Application previously filed in the District Munsif's Court—Deduction of time spent during the pendency of the application there—Limitation Act, Ss. 5 and 14.

An application was filed in the District Munsif's Court for adjudicating the debtor as an insolvent but was dismissed on the ground that that Court had no jurisdiction to entertain the application. He then applied to the District Court. On the date of the application to the District Court, more than three months after the act of insolvency relied on in the application had expired. The applicant claimed deduction of the period taken during the pendency of the application before the District Munsif under S. 14 of the Limitation Act.

Held that, though S. 14 of the Limitation Act was not applicable to the proceedings under the Insolvency Act, the fact that the petitioner was conducting proceedings in another court might be a sufficient cause under S. 5 of the Limitation Act, but, in the present case, the delay cannot be excused as it must be well-known to the lawyers and the litigants that the Munsif's Court had no jurisdiction to entertain such application.

B. Somayya for Appellant.

T. Appaji Rao Amicus Curriae.

N. S.

Kumaraswami Sastri and Reilly, JJ.
9th March, 1928.
S. A. Nos. 515 and 516 of 1925.

Religious Endowment—Hereditary archaka of temple—Order of suspension by trustees—Notice of enquiry—Necessity of—Two trustees passing orders without consulting the third—Validity of the order.

NRC

A hereditary archaka of a temple is entitled to be given notice of enquiry before any adverse order interdicting him from performing the worship of the temple is passed against him.

An order of suspension of a hereditary archaka by two of the trustees without consulting the third is illegal.

S. Varadachariar, K. Narasimha Aiyangar and *R. Rajagopala Aiyangar* for Appellant.

S. Muthiah Mudaliar for Respondent.

N. S.

Kumarasawmi Sastri and Reilly, JJ. 12th March, 1928. — S. A. No. 392 of 1925.

Partnership—Dissolution—One partner paying a mortgage debt due by the partnership—Suit for contribution against another—Maintainability.

After dissolution of a partnership, one partner cannot maintain a suit for contribution in respect of monies paid by him in discharge of a mortgage debt due by the partnership.

49 I.A. 181=45 M. 378=43 M. L. J. 305 (P. C.), referred to.

K. Bhashyam Aiyangar for Appellant.

N. Sivaramakrishna Aiyar for *K. Venkatcraghavachariar* for Respondent.

N. S.

Kumaraswami Sastri and Reilly, JJ. 12th March, 1928. — S. A. No. 401 of 1925.

Subrogation—Puisne mortgagee paying off prior mortgage with monies expressly reserved with him by the mortgagor.

Where a puisne mortgagee paid off the prior mortgage with the monies expressly reserved with him for that purpose, he acts not merely as the agent of the mortgagor but by virtue of his interest in his own mortgage and is therefore entitled to the rights of the prior mortgagee by subrogation.

T. M. Ramaswami Aiyar for Appellant.

R. Krishnaswami Aiyangar for Respondent.

N. S.

Kumarasawmi Sastri and Reilly, JJ. 13th March, 1928. — S. A. No. 139 of 1925.

Limitation Act, Art. 124—Hereditary archaka of temple—Suit for recovery of office from trustees and their appointees—Other trustees added after 12 years—Limitation—Second appeal—Omission to consider documents by the lower court—Interference.

The hereditary archaka of a temple brought a suit for the recovery of the office of archaka against the trustees of the temple who

dispossessed him and their appointees within 12 years from the date of the dispossession and subsequently added the other trustees as parties to the suit more than 12 years after that date.

Held, (1) that the onus of proof was on the defendants to prove when the adverse possession commenced under Art. 124 of the Limitation Act,

(2) that the suit was not barred even as against the trestees added after the 12 years period, and

(3) that the omission by the lower appellate Court to consider certain documents bearing on the question of adverse possession was no ground for interference in second appeal.

41 M. 561=34 M. L. J. 381 (F. B.), referred to.

T. Rangachariar and *K. S. Krishnaswami Aiyangar* for Appellant.

V. V. Srinivasa Aiyangar, T. D Srinivasachariar, C. Padmanabha Aiyangar and *R. Gopalswami Aiyangar* for Respondents.

N. S.

Waller and Madhavan Nair, JJ.
14th March, 1928. S. A. No. 874 of 1925.

Jurisdiction—Civil Court—Suit to recover religious office to which no emoluments are attached.

A suit to enforce a right in respect of a religious office to which emoluments are attached is cognizable in a Civil Court, whereas a suit to recover offices to which no emoluments are attached but which would entitle the holder of the office to receive voluntary offerings is not cognizable in the Civil Court.

19 M. 62=5 M.L.J. 209, 37 A. 412 and 1 P.L.J. 381, referred to.

B. Jagannadha Doss for Appellant.

V. Govindarajachari for Respondent.

N. S.

Devadoss and Jackson, JJ.
14th March, 1928. C. R. P. Nos. 660 and 661 of 1926.

Partition—Suit for—Preliminary decree—Dismissal of suit after the preliminary decree—Validity of.

An order dismissing a suit for partition after the passing of the preliminary decree is erroneous and is made without jurisdiction. But it cannot be considered as an absolute nullity and further proceedings cannot be taken without setting aside that order.

Ch. Raghava Rao and *V. Pattabhirama Sastri* for Petitioner.

K. Ramachandra Aiyar Amicus Curiae.

N. S.

The Chief Justice and Madhavan Nair, JJ.
16th March, 1928.

O. S. A. No. 95 of 1926.

Letters Patent (Madras), Clause 12—Property outside Madras—Contract to sell, entered into in Madras—Suit for specific performance in the High Court—Maintainability.

The following question was referred to a Full Bench:—

Is a suit for specific performance of a contract to sell lands outside Madras which was entered into in Madras, a suit for land within the meaning of clause 12 of the Letters Patent and so not cognizable by the High Court exercising its ordinary original civil jurisdiction.

T. M. Krishnaswami Aiyar and *M. Subbaraya Aiyar* for Appellant.

K. S. Krishnaswami Aiyangar, T. N. C. Srinivasavaradachari and *T. Ramachandra Rao* for Respondent.

N. S.

The Chief Justice, Ramsam, Wallace, Beasley and Thiruvenkata Achariar, JJ.
20th March, 1928.

Ref. Cases Nos. 21 and 22 of 1926.

Income-tax Act, S. 10 (2) (iii)—Partnership—Partner's advances over and above the initial capital—Agreement that interest should be paid on the advances—Interest paid whether an admissible deduction.

Where a partner, in addition to the initial capital subscribed by him, lends to the partnership a certain sum of money on the distinct understanding that in respect of this loan he is to receive interest from the partnership.

Held, that the interest paid to the partner is a legitimate item of business expenditure within the meaning of S. 10 (2) (iii) of the Income-tax Act in the computation of the income of the firm.

K. S. Krishnaswami Aiyangar and *V. Rajagopala Aiyar* for Assessee.

M. Patanjali Sastri for the Commissioner of Income-tax.

N. S.

Kumaraswami Sastri and Reilly, JJ.
23rd March, 1928.

S. A. No. 565 of 1927.

Madras Estates Land Act, S. 192—Order of remand in a rent suit—Appeal.

No appeal lies to the High Court from an order of remand passed by a District Judge in an appeal from a suit filed under the Madras Estates Land Act for recovery of rent.

1 L. W. 667 and 12 I. C. 146, followed.

P. Satyanarayana Rao for Appellant.

V. Govindarajachari for Respondent.

N. S.

Kumaraswami Sastri and Reilly, JJ.
13th March, 1928.

A. S. No. 456 of 1923.

Hindu Law—Step-mother taking possession of husband's properties—Necessary expenses incurred by her—Subsequent recovery of the properties by the reversioner—Right of step-mother to recover the amount of the necessary expenses—Limitation Act, Art. 61—Commencement of limitation.

The step-mother of a deceased person who entered into possession of his properties on his death executed a mortgage to the plaintiffs. Subsequently, the reversioners of the deceased person filed a suit and recovered the properties from her. This suit was finally disposed of in 1920. The plaintiffs and the step-mother instituted a suit upon the mortgage and impleaded the reversioners as defendants. It was found that expenses to the extent of Rs. 600 were incurred in 1916-1918 for purposes binding on the estate.

Held (1) that the step-mother who had a right of residence and maintenance could not be considered to have been in wrongful possession of the properties and therefore she could be entitled to recover the expenses incurred by her for the purpose of benefiting the estate, and consequently the plaintiffs could be entitled to recover the sum of Rs. 600 if it was not barred; (2) that Article 61 of the Limitation Act applied to this claim, as no charge could be said to have been created in respect of the monies spent by her, and that the claim was barred as time must be taken to have begun to run either from the date of the payment or at least from the date of the demand made by the reversioners for the recovery of the estate, and *not* from the date of the final decision, viz., 1920.

K. S. Sankara Aiyar for Appellant.

N. Rajagopalachari for Respondent.

N. S.

Phillips and Devadoss, JJ.
14th March, 1928.

A. S. No. 447 of 1923.

Mortgage—Co-mortgagees—Part adjustment by one alone—If binding on the other—Suit by the other for his share of the mortgage amount—Maintainability.

One of two co-mortgagees took a sale deed for portion of the mortgaged properties, in discharge of the mortgage. The other co-mortgagee filed a suit for the recovery of his share of the mortgage amount against the mortgaged properties.

Held (1) that the arrangement by the defendant co-mortgagee with the mortgagor did not amount to a full discharge of the mortgage and consequently was not binding upon the plaintiff; (2) that the suit for recovery of the plaintiff's share of the mortgage amount was maintainable as the defendant co-mortgagee admitted that his share of the mortgage amount was discharged by the mortgagor; (3) that the plaintiff was entitled to enforce his mortgage debt as against every portion of the mortgage security.

45 All. 46, dissented.

N R C

V. Narayana Aiyar, T. V. Ramanatha Aiyar and *T. V. Venkatarama Aiyar* for Appellant.

T. M. Krishnaswami Aiyar, S. S. Ramachandra Aiyar, K. Periasami Goundar for Respondent.

N. S.

Jackson, J.
19th March, 1928.
C. R. P. Nos. 787 and 798 of 1927.

Madras Local Boards Act, S. 228—Levy of professional tax—Suit for refund on the ground that the plaintiff was not carrying on money-lending business—Maintainability.

The plaintiff was assessed professional tax by the Taluk Board on the ground that he got the income by money-lending business. The plaintiff filed the suit for recovery of the amount on the ground that he was not doing money-lending business.

Held, that the suit was barred by S. 228 of the Local Boards Act, as the question whether the plaintiff carried on money-lending business or not was a question of fact.

V. S. Narasimhachari for *P. Chenchiah* for Petitioner.

H. Suryanarayana for Respondent.

N. S.

Wallace and Tiruvenkatachari, JJ.
19th March, 1928.
S. A. No. 1270 of 1924.

Civil Procedure Code, O. 23, R. 1—Preliminary decree—Subsequent withdrawal of suit—Effect—Applicability to execution proceedings—Minor—Irregular procedure by guardian—Effect.

The provisions of O. 23, R. 1, Civil Procedure Code, do not apply in cases where either a preliminary or final decree has been passed.

The provisions of O. 23, R. 1, do not apply to execution proceedings.

An irregular procedure adopted by the guardian of a minor should not prejudice the rights of the minor especially where the ill-advised act of procedure was due to the direction of court itself.

C. Rama Rao for Appellant.

A. Ramachandra Aiyar and *B. V. Raghava Raju* for Respondent.

N. S.

Phillips and Odgers, JJ.
21st March, 1928.
A. S. No. 181 of 1925.

Poramboke lands—Right of Government to levy assessment—Easement—Person claiming as owner—If can be granted relief by way of easement.

The Government has a prerogative right to levy assessment in respect of all lands, unless there is an agreement expressed or implied not to levy the same. The mere fact that a land is poramboke does not mean that the Government is not entitled to levy assessment in respect

of it. Poramboke can be converted into iyan land and Government can recover revenue.

A person who claims as owner of certain properties cannot get a relief by way of easement over the properties.

The Government Pleader for Appellant.

T. Rangachariar, *P. Marthandam Pillai* and *A. Deivanayagam Pillai* for Respondent.

N. S.

Wallace and Tiruvenkatachari, JJ. *21st March*, 1928. } C. M. A. No. 561 of 1925.

Limitation Act, S. 15—Civil Procedure Code, S. 48—Execution of decree barred by lapse of 12 years—Applicability of section.

S. 15 of the Limitation Act cannot be read so as to overrule S. 48, Civil Procedure Code, which is self-contained. It applies only in regard to periods of limitation prescribed in the schedule to the Limitation Act.

K. Kameswara Rao for Appellant.

B. Satyanarayana for Respondent.

N. S.

Devadoss, J. *21st March*, 1928. } Crl. Revision Case No. 966 of 1927.

Madras City Municipal Act, S. 287—Owner of Coffee Hotel premises—Lease of premises for 10 years—Owner not taking out license—Owner if can be convicted.

The owner of a coffee hotel premises who has leased the premises for a period of 10 years cannot be said to have any beneficial ownership and consequently cannot be convicted for failure to take out license under S. 287, City Municipal Act.

K. P. Ramakrishna Aiyar for Petitioner.

V. Rajagopalachari for Crown Prosecutor.

S. Rangasami Aiyangar for Complainant.

N. S.

Jackson, J. *26th March*, 1928. } C. R. P. No. 984 of 1927.

Madras District Municipalities Act, S. 354—Assessment of professional tax—Suit for refund on the ground that the tax was fixed maliciously and arbitrarily—Maintainability.

A suit for refund of professional tax collected from the plaintiff on the ground that the tax was levied maliciously and arbitrarily is maintainable in the Civil Court.

K. Sreenivasa Rao for Appellant.

B. Somayya for Respondent.

N. S.

Devadoss, J.

26th March, 1928. } C. R. P. No. 321 of 1927.

Madras Local Boards Act, S. 21—Suit against a Taluk Board —President engaging a vakil—Permission of the Council not obtained—Right of pleader to have his fees paid from the Taluk Board—Doctrine of part-performance.

Where a vakil was engaged by the President of a Taluk Board to defend a suit brought against the Board and the Taluk Board subsequently repudiated the liability to pay his fees and expenses incurred for the suit on the ground that the President had no power to engage the vakil without sanction from the Board,

Held, that the President could engage vakils to defend suits filed against the Board by virtue of the executive authority vested in him under S. 21 of the Local Boards Act as there was no provision in the Act expressly taking away that power, and also that, under the doctrine of part-performance, the Board was bound to pay the fees and expenses incurred by a vakil who acted in such circumstances, though the sanction of the Board was not obtained for the same.

P. Satyanarayana Rao for Petitioner.

K. Bhimasankaram for *B. Satyanarayana* for Taluk Board.

V. Pattabhirama Sastri for the former President.

Devadoss, J.

30th March, 1928. } C. R. P. No. 1541 of 1927.

Madras District Municipalities Act—Election to Municipality —Recording of votes by illiterate voters—Presence of the candidate or his agent—Necessity of.

There is nothing in the rules which requires the presence of the candidate or his agent at the time of the recording of the votes by the illiterate voters.

T. M. Krishnaswami Aiyar and *T. M. Ramaswami Aiyar* for Petitioner.

T. Rangachariar and *V. N. Venkatavaradachariar* for Respondent.

N. S.

Beasley, J.

30th March, 1928. } C. S. No. 356 of 1927.

Madras City Municipal Act, Ss. 129 and 349—Bye-laws framed by Corporation regarding refund of timber taxes—Legality.

The Corporation has power under Ss. 129 and 349 of the City Municipal Act to frame bye-laws imposing conditions regarding the refund of timber taxes.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Plaintiff.

S. Rangaswami Aiyangar and *P. Chakrapani Aiyangar* for Defendant.

N. S.

Devadoss and Jackson, JJ.
14th March, 1928.

C. R. P. No. 843 of 1927.

Provincial Insolvency Act—Ss. 28 and 78—Limitation Act, S. 15—Money due on accounts—Subsequent adjudication—Suit filed for recovery of money against insolvent with leave of court before annulment—If insolvency stops running of limitation.

The defendant owed money to plaintiff on accounts which were settled on 16th August, 1923. The defendant was adjudicated insolvent on 2nd February, 1924. Defendant applied for discharge in insolvency which was refused. Plaintiff obtained leave of court to sue defendant on 22nd September 1926 and filed the present suit on 10th January, 1927. The question arose if the suit was barred by limitation and whether insolvency operates as a stay of suits. The lower court decreed the suit.

Held (on revision) that the mere fact of insolvency will not operate as a stay of all proceedings against the insolvent, and as time had already begun to run prior to insolvency and as there was no annulment of adjudication, S. 78 of the Provincial Insolzency Act will not save limitation.

L. R. (1914) 2 Ch. 68 and I. L. R. 42 M. 319=36 M.L.J. 104, followed.

K. P. Ramakrishna Aiyar for Petitioner.

K. Kuttikrishna Menon for Respondent.

N. S.

Wallace and Tiruvenkata Achariar, JJ.
21st March, 1928.

A. S. No. 355 of 1922.

Limitation Act, Arts. 14, 120, 142 and 144—Village service inam in permanently settled estate—Enfranchisement by Government—Suit by owner of the estate—Limitation—Madras Proprietary Estates' Village Service Act (II of 1894), S. 17—Validity of the enfranchisement—Burden of proof—Paimash registers—Probative value of.

Certain village service inams in the Pithapur and Palivela Estates were enfranchised by the Government under S. 17 of the Madras Proprietary Estates' Village Service Act (II of 1894). The enfranchisement was declared to come into effect on 1st January 1907. In accordance with the requirements of S. 80 of the Civil Procedure Code, notice of suit was given by the Zamindar to the Government on 24th December, 1918, questioning the validity of the enfranchisement and a suit was filed by the zamindar on 1st March 1919 against the Government and inamdars for a declaration that the enfranchisement was invalid, for an injunction restraining the Government from collectng quit rent or otherwise interfering with the exercise by the plaintiff of his rights in the land and for such possession of the lands as the plaintiff may be found to be entitled to. It was contended for the Government that the suit was barred by limitation either under Art. 14 of the Limitation Act or under Art. 120.

Held :—(1) that the enfranchisement was really unauthorised as alleged by the plaintiff and it was void and without jurisdiction and it

was unnecessary to set it aside and that therefore Art. 14 was inapplicable ;

(2) that the suit was in substance a suit for a possessory relief and was governed by either Art. 142 or Art. 144 and not by Art. 120 :

and (3) that the suit was therefore in time inasmuch as it was filed within 12 years excluding the two months covered by the suit notice.

Case Law, reviewed.

Held further, (on the merits) (i) that the village service inams other than karnam service inams were taken into account at the time of the permanent settlement ; (ii) that they are not lakhiraj lands within the meaning of S. 4 of the Madras Permanent Settlement Reg. XXV of 1802 ; (iii) that they could be enfranchised by the Government under S. 17 of the Madras Proprietary Estates Village Service Act II of 1894 only when they were granted or continued by the state within the meaning of that section ; (iv) that the burden of proving that they were not so granted or continued lay on the person questioning the validity of the enfranchisement which is *prima facie* evidence that the conditions laid down in S. 17 exist.

Case law, considered.

Their Lordships further considered the probative value of paimash registers in deciding whether a particular inam is pre-settlement or post-settlement.

The Government Pleader instructed by *C. V. Harihara Aiyar* for the Government (Appellant).

A. Krishnaswami Aiyar and *V. Govindarajachari* for Respondent.

N. S.

Madhavan Nair and Jackson, JJ.
27th March, 1928. } C.M.S.A. No. 224 of 1927 and C. R. P. No. 1719 of 1927.

Surety bond—Strict construction.

A judgment-debtor was released on the execution of a bond by a surety to the effect that he will produce the judgment-debtor whenever called upon to do so till the judgment-debtor, who would apply to be adjudicated an insolvent, apply for discharge and order was passed thereon. The judgment-debtor was adjudicated an insolvent and subsequently put in an application for discharge. But this application was dismissed on opposition by some creditors.

Held, that a surety bond must be construed strictly and on the construction of this bond the surety must be taken to have complied with the terms of the bond when the insolvent put in application for discharge and appeared before the Court though the order that was passed was one dismissing the petition.

Srinivasaraghavan and *Thiagarajan* for Appellant.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Respondent.

N. S.

Phillips and Reilly, JJ. } C. M. P. No. 5080 of 1927.
28th March, 1928.

Civil Procedure Code, S. 109—Application for leave to appeal to Privy Council--Appeal dismissed on the ground of appellant having committed contempt of court—Applicant still in contempt on the date of the filing of the application—Effect.

An Appeal was dismissed by the High Court on the ground that the appellant had committed contempt of court by not obeying the order of the Court and the appeal could not be postponed indefinitely to enable the appellant to comply with the terms of the order. An application for leave to appeal to the Privy Council against the dismissal of this appeal was filed.

Held, that a party in contempt of Court had no right to come before the court and ask the court for any action to be taken, though as a defendant or respondent he would not lose the right to put forward any objection or plea in any proceeding pending against him, and as the applicant was still in contempt on the date of the filing of the application he had no right of audience and the application must be dismissed.

T. M. Krishnaswami Aiyar, K. Desikachari and *K. Ramanathan Chettiar* for Petitioner.

C. S. Venkatachari and *D. Ramaswami Aiyangar* for Respondent.

N. S.

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The Chief Justice and Madhavan Nair, J. } Crl. Revision Case No. 821 of 1927.
2nd April, 1928.

Criminal Procedure Code, S. 162—Oral statements made to the police by the prosecution witness while the case was under investigation—Admissibility.

The question as to the admissibility during the trial, of the oral statements made by a prosecution witness to the police while the case was under investigation was referred to a Full Bench.

Nugent Grant and *C. Sambasiva Rao* for Petitioner.

The Public Prosecutor for the Crown.

N. S.

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Kumaraswami Sastri and Reilly, JJ. } L. P. A. No. 13 of 1928.
3rd April, 1928.

Civil Procedure Code, O. 21, R. 66—Order relating to the settlement of sale proclamation—Appeal.

Orders relating to the settlement of a sale proclamation under O. 21, R. 66, C. P. Code, are not judicial orders but are merely administrative and ministerial orders and consequently are not appealable, unless they can be construed to fall under S. 47.

27 M. 259=14 M.L.J. 57 (F. B.), followed.

T. V. Venkatrama Aiyar for *B. Venkatraman* for Appellant.

C. S. Venkatachariar for Respondent.

N. S.

Devadoss, J.
3rd April, 1928.
C. M. A. No. 395 of 1926.

Provincial Insolvency Act, S. 28—Hindu trading family—Adjudication of manager as insolvent—Manager's power to sell family properties for debts—If vests in the Official Receiver.

Where the manager of a joint Hindu trading family is adjudicated an insolvent, the power of the manager to sell the joint family properties for debts binding on the joint family vests in the Official Reciver, and the Official Receiver can exercise such power and sell the properties for such debts.

Case law, reviewed.

T. R. Arunachala Aiyar for *B. Somayya* for Appellant.

V. S. Narasimhachari for Respondent.

N. S.

Madhavan Nair and Jackson, JJ.
4th April, 1928.
C. M. A. No. 467 of 1927.

Execution—Application for transfer of decree to another Court for execution—Notice to judgment-debtor—Objection by judgment-debtor that decree not executable—Duty of court to decide, before ordering transfer.

An application was filed for the transfer of the decree to another court for execution. After notice, the judgment-debtor appeared and raised an objection that the decree was not executable.

Held, that as, after notice, the judgment-debtor was bound to put forward all objections to the executability of the decree, the court was bound to decide on the pleas raised by the judgment-debtor before ordering the transfer of the decree.

47 M. 641=47 M. L. J. 4, referred to.

B. Vinayaka Rao for Appellant.

A. Swaminatha Aiyar for Respondent.

N. S.

Ramesam, J.
4th April, 1928. } C. R. P. No. 674 of 1927.

Easements Act, S. 15—*Inamdar using zamindar's tank water for over 20 years without assessment—Right by prescription.*

An Inamdar has been using zamindar's tank water for second crop for over twenty years freely without any assessment. The Zamindar filed suits claiming compensation for unauthorised use of water. The District Munsif applying 44 M. 534=40 M. L. J. 213 gave decree to the plaintiff on the ground that the Defendants have not made out usage.

Held that the decision in 44 M. 534=40 M. L. J. 213 was a case between landlord and tenant and had no application to this case. *Held also* that twenty years' use of water certainly will make out an easement by prescriptive right.

7 I. A. 240=6 Cal. 394 (P. C.), referred to.

K. Kuppuswami Aiyar for Petitioner.

M. Venkatasubbaiah for *A. Krishnaswami Aiyar* for Respondent.

Phillips and Madhavan Nair, JJ.
10*th April*, 1928. } C. M. S. A. No. 116 of 1927.

Limitation Act, S. 15 *and Art.* 182, *cl.* (5)—*Application for execution by attaching decree-holder—Execution Petition filed more than three years after prior Execution Petition—Interim injunction got by attaching decree-holder against judgment-debtor—If saves limitation.*

An attaching decreee-holder applied for execution of attached decree more than three years after the *prior* Execution Petition. Before he got a final decree in his own suit he had got an interim injunction against the decree-holder of the attached decree preventing him from executing his decree, and relied upon the injunction to save limitation under S. 15 of the Limitation Act,

Held, S. 15 of the Limitation Act applied and the present Execution Petition was within time as the injunction prevented execution of the decree by the decree-holder and the attaching decree-holder was a representative of the original decree-holder and could not execute the decree himself,

K. P. Ramakrishna Aiyar for Appellant.

V. P. Karunakaran Nambiar for Respondent.

Ramesam, J.
11*th April*, 1928, } S. A. No. 415 of 1924.

Limitation Act, S. 20 *and Art.* 149—*Suit against assignee of Government—Acknowledgment of title of Government—If saves limitation.*

In a suit against an assignee (Pattadar) from Government, an acknowledgment by plaintiff of the title of Government saves limitation and the assignee has a fresh period from that date.

N. R. C.

Semble. When an assignee is in possession, and a suit is brought against him, whether the 12 years' period or 60 years' period will apply.

30 Mad. 245=17 M. L. J. 174, referred to

The Advocate-General (C. V. Ananthakrishna Aiyar) and *K. P. Ramakrishna Aiyar* for Appellant.

K. S. Jayarama Aiyar for Respondent.

The Chief Justice and Odgers, J.
11th April, 1928. — A. S. No. 235 of 1924.

Transfer of Property Amendment Acts (XXVII of 1926 and X of 1927)—If retrospective—Signatures of registering officer and identifying witnesses—If amount to attestation.

Their Lordships referred for the decision of a Full Bench the following questions :—

(1) Whether Acts XXVII of 1926 and X of 1927 are retrospective in their nature so as to apply to the documents executed on a date prior to their coming into force.

(2) Whether the signatures of the registering officer and of the identifying witnesses affixed to the registration endorsement under section 58 of the Indian Registration Act amount to a sufficient attestation within the meaning of section 59 of the Transfer of Property Act read with the aforesaid amending Act.

(3) Consequently whether App. 170 of 1925 (decision of Phillips and Odgers, JJ., to the effect that the above Acts were not retrospective) was rightly decided ?

T. V. Venkatarama Aiyar and *T. V. Ramanatha Aiyar* for appellant.

T.V. Muthukrishna Aiyar, N. Muthuswami Aiyar, T.S. Subramania Aiyar and *T. S. Srinivasa Aiyar* for respondents.

Phillips, Odgers and Venkatasubba Rao, JJ.
12th April, 1928. — C. R. P. Nos. 1027 and 1028 of 1924 and 301 of 1927.

Civil Procedure Code, S. 115—Government of India Act, S. 107—Orders of the Board of Revenue under the Madras Estates Land Act—If revisable by the High Court.

Phillips and Odgers, JJ.—The Board of Revenue is not a civil court subordinate to the High Court and orders passed by the Board under the Madras Estates Land Act are not revisable by the High Court.

49 M. 499, overruled.

Venkatasubba Rao, J.—Orders passed by the Board of Revenue under Ss. 190 and 205 of the Madras Estates Land Act are capable of being revised by the High Court, as the Board of Revenue acting under these sections is a civil court.

A. Krishnaswami Aiyar and *C. Sambasiva Rao* for Petitioner.

T. R. Venkatarama Sastri with the Government Pleader and *B. Jagannadha Das* for Respondent.

N. S.

Kumaraswami Sastri and Reilly, JJ.
16th April, 1928.

S. A. No. 1468 of 1923.

Civil Procedure Code, Order 22—Death of a respondent in an appeal—Application to bring on record legal representatives—Notice to other respondents—Necessity of.

Where one of the respondents in an appeal dies and an application is filed to bring his legal representatives on record, notice of the application must be given to the other respondents in the appeal But, where the deceased respondent's interest in the appeal was not adverse to that of the appellant and notice of the application was not given to the other respondents before bringing on record the legal representatives,

Held, that the appeal did not abate by reason of the failure to give the notice, as the appeal could have been proceeded with even if the deceased respondent had not been made a party to the appeal.

C. S. Venkatachariar, L. S. Veeraraghava Iyer, and *D. Ramaswami Aiyangar* for Appellant.

K. S. Jayarama Aiyar, A. Ramakrishna Aiyar, K. P. Ramakrishna Aiyar, and *M. S. Varadachari* for Respondents.

N. S.

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Phillips and Odgers, JJ.
19th April, 1928.

A. S. Nos. 130 and 193 of 1924.

Madras Rivers Conservancy Act, Ss. 11 and 16—Government taking possession of river—Possession of lankas demanded by zamindar—Delay in delivering possession—Zamindar's right to mesne profits.

Where the Government took possession of a river under the statutory powers conferred by the Madras Rivers Conservancy Act and possession of certain lankas newly formed in the said river was demanded by the Zamindar who was entitled to them and the Government delayed delivering up possession of the said lankas for over a year after such demand :

Held, that the Zamindar was still not entitled to mesne profits for that year as he had not asked for permission to cultivate, as he ought to have done under S. 11 of the Madras Rivers Conservancy Act, and as the liability for damages under S. 16 of the said Act arises only on a wrongful refusal of such permission.

A. Krishnaswami Aiyar and *V. Govindarajachari* for Zemindar.

The Government Pleader for the Government.

N. S.

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The Chief Justice and Madhavan Nair, J.
20th April, 1928.

L. P. A. No. 204 of 1925.

Insolvency—After-acquired properties of insolvent—Right of undischarged insolvent to maintain proceedings in court regarding.

Their Lordships referred the following question to a Full Bench :—

"Is it open to an undischarged insolvent to maintain proceedings in Court regarding his after-acquired properties subject to the right of the Official Receiver to intervene in such proceedings?"

V. Ramaswami Aiyar for *K. Rajah Aiyar* for Appellant.

S. T. Srinivasagopalachari and *R. Gopalaswami Aiyangar* for Respondent.

N. S.

Odgers, J.
23rd April, 1928. C. R. P. Nos. 565 and 703 of 1927.

Civil Procedure Code, S. 152—*Decree against a person—Application for amendment to change the name into one with an* alias—*If can be granted.*

Where a decree was passed against one Ramachendrayya and it was sought to be amended into one against Ramachendrayya *alias* Chendrayya in order that execution might issue against the respondent on the ground that he went by both names:

Held, the petition was not maintainable under S. 152 of the C. P. Code as there was no clerical or arithmetical mistake nor an accidental slip or omission.

25 L. W. 102 and the cases cited therein distinguished as cases relating to the insertion of a wrong survey number by mistake where the identity of the property concerned was beyond dispute.

V. Suryanarayana for Petitioner.

V. Govindarajachari for Respondent.

N. S.

Phillips and Madhavan Nair, JJ.
26th April, 1928. S. A. No. 7 of 1928.

Madras Local Boards Act, Ss. 104 (2) & (3) *and* 166—*Licence—Meaning of.*

The word "licence" used in S. 104 (3) of the Madras Local Boards Act refers to the licence specified in sub-clause (2) of the same section, *i.e.*, a licence issued by way of compounding toll-gate fees; consequently, a licence issued under S. 166 of the Act to ply for hire or to take passengers is not a licence within the meaning of the word used in S. 104 (3) and a person who has obtained a licence under S. 166 is not entitled to claim exemption from payment of tolls.

T.M. Krishnaswami Aiyar for *K. Rajah Aiyar* and *R. Sundaralingam* for Appellant.

P. Venkatramana Rao and *P. K. Janakiraman* for Respondent.

N. S.

Devadoss, J.
16th April, 1928.

Crl. Rev. Case No. 828 of 1927.

Village Courts Act—Village panchayat court—Power to take bond from accused for appearance.

A village panchayat court has no power to take a bond from the accused to enforce his appearance on future adjourned dates, after the accused appears before the court in pursuance of the summons.

A. C. Sampath Aiyangar for Petitioner.

The Public Prosecutor for the Crown.

N. S.

Phillips, Ramesam and Madhavan Nair, JJ.
17th April, 1928.

C. M. A No. 209 of 1927.

Civil Procedure Code, Order 23, Rule 3—Pending suit—Reference to arbitration without order of court—Award not agreed to by the parties—If can be filed as an agreement.

The award passed by the arbitrators on a reference by the parties in a suit without the order of the court can be filed in court as an agreement or compromise of the suit under Order 23, Rule 3, C. P. Code, even though the parties do not agree to the award.

P. Somasundaram for Appellant.

T. M. Krishnaswami Aiyar for Respondent.

N. S.

The Chief Justice and Madhavan Nair, J.
17th April, 1928.

O. S. A. No. 121 of 1926.

Hindu Law—Joint family business—Trade carried on by manager of joint Hindu family—When binding on minors.

The test to find out whether a business started by the manager of a joint Hindu family is a joint business on behalf of the family or not is whether the adult co-parceners participated in the business or acquiesced in the same.

S. Doraiswami Aiyar for Appellant.

K. S. Krishnaswami Aiyangar for Respondent.

N.S.

The Chief Justice and Madhavan Nair, J.
18th April, 1928.

O. S. A. No. 6 of 1928.

Madras District Municipalities Act, Ss. 92 and 350—"Transact business"—Meaning of—Suit for refund of tax collected more than six months prior to the institution—Limitation.

The words "transact business" in Section 92 of the District Municipalities Act have the same interpretation as the words "carry on business" which occurred in the old Act of 1882, and must be interpreted according to the English decisions under the English Income Tax Act so as not to include any and every case where some business transaction takes place within the Municipal limits.

N R C

A suit for refund of profession tax collected more than six months prior to the institution of the suit on the ground that the tax has been illegally collected is in the nature of a suit for money had and received and consequently is not barred by limitation. The cause of action for such a suit is really based on the equity attaching to the parties who received the payment and the suit is not one based on any implied contract or tort.

T. M. Krishnaswami Aiyar for Appellant.

Vere Mockett and *R. N. Aiyangar* for Respondent.

N.S.

Devadoss, J.

19th April, 1928. } C. R. P. No. 562 of 1928.

Madras Local Boards Act, Ss. 56 and 57—Election enquiry rules—Rule No. 11—Members of board ceasing to be members for failure to attend meetings—Jurisdiction of District Judge to enquire into—Voting by ballot—Admissibility of oral evidence.

At the time of an election of a president to an Union Board objection was raised on behalf of one of the candidates that two of the members were not entitled to vote as they had lost their seats by failing to attend meetings for three consecutive months. The objection was overruled and one of the candidates was declared elected as president. Thereupon the defeated candidate put in a petition to the District Court to declare the election void. The District Court held that the two members who had participated in the election had no right to do so. Against this a Revision Petition was filed in the High Court.

Held (1) that the two alleged disqualified members having been restored to their offices by the board at a second meeting after they ceased to be members, they must be deemed to be qualified members to take part in the meeting at which the election was held ;

(2) That the question as to the disqualification of the members must be investigated on a petition presented by the board or by a member and the District Judge had no jurisdiction to decide this question ;

(3) The restoration of the members by the board was not *ultra vires* though it might be irregular ;

(4) That as the election was by a secret ballot the District Court acted illegally in taking oral evidence regarding the ballot ;

(5) That therefore the order of the District Court must be set aside.

T. R. Venkatarama Sastri and *K. S. Sankara Aiyar* for Petitioner.

T. M. Krishnaswami Aiyar and *N. S. Srinivasa Aiyar* for Respondent.

N. S.

Beasley, J.

19th April, 1928. } C. S. No. 197 of 1927.

Madras City Municipal Act—Places used for the storing of liquors—Right to levy license fees—Arbitrary increase of assessment—Legality.

The Corporation is empowered to levy an assessment for each place in which liquor has been stored by a company. But when the Corporation suddenly increased the assessment from Rs. 25 to Rs. 100 in respect of each place of storage;

Held that the increased assessment was made arbitrarily and was liable to be set aside in a suit by the Company against the Corporation.

Vere Mockett for Plaintiff.

S. Rangaswami Aiyangar and *R. Chakrapani* for Defendant.

N.S.

Kumaraswami Sastri and Reilly, JJ.
19th April, 1928.
A. S. Nos. 100 and 101 of 1925.

Limitation Act, Arts. 66 and 116—Registered mortgage—Personal covenant—Suit for enforcement of—Limitation.

The article of the Limitation Act applicable to a suit to enforce a personal covenant in a registered mortgage deed is Art. 116 and not Art. 66 and consequently the period of limitation is six years.

53 I.A. 134: 5 Pat. 585 : 51 M.L.J. 82 (P.C.), explained.

Case law reviewed.

G. Lakshmanna for Appellant.

A. Krishnaswami Aiyar, T.V. Venkatarama Aiyar, T.V. Ramanatha Aiyar and *M. Venkatasubbiah* for Respondents.

N.S.

Devadoss, J.
19th April, 1928.
Crl. R. C. Nos. 969 to 971 of 1927.

Criminal Procedure Code, Ss. 265 and 366—Bench Magistrates—Majority voting for conviction and minority for acquittal—Record prepared and judgment delivered by the President in the absence of the other magistrates—Judgment signed only by the President—Legality.

In a case tried by a bench of nine magistrates it appeared that, after the conclusion of the trial, votes were taken and five voted for the conviction while four were for acquittal; after the trial was over all the magistrates left the Court, and the President subsequently prepared the record and wrote the judgment and delivered the same in the presence of the complainant and the accused at about 8 p.m. in the absence of the other magistrates who had already gone away on account of the lateness of the hour.

Held, on revision, that, though the record and the judgment prepared and signed by the President was not illegal having regard to Section 366 of the Criminal Procedure Code, it was essential that at the time when the judgment was delivered all the magistrates should be present, and consequently the judgment in the present case is not a proper judgment and the action of the President amounted to an illegality and the conviction must be set aside and re-trial ordered.

V. L. Ethiraj and *A. Rangaswami Aiyangar* for Petitioner.

The Public Prosecutor for the Crown.

N.S.

Phillips and Odgers, JJ.
23rd April, 1928.

C. R. Ps. Nos. 1631 to 1635 of 1927.

Madras Hindu Religious Endowments Act, Ss. 2 and 84 (1)—Endowment board whether a Court—Temple declared to be public by the board—Application for declaration that Temple is private—Court-fee.

A temple was declared to be a public temple by the Religious Endowments Board. Thereupon an application was made to set aside the decision of the Board and for a declaration that the temple is a private temple.

Held, that the Religious Endowments Board was not a Court and consequently Art. 17 (1) of the Court-fees Act was not applicable but Art. 17 (a) (1) was the Art. which would apply.

K. Krishna Menon for Petitioner.

P. Venkataramana Rao for Respondent.

N S.

Ramesam, Waller and Jackson, JJ.
25th April, 1928.

Crl. R. C. No. 821 of 1927.

Crl. Procedure Code, S. 162—Oral statements made to Police conducting investigation—Admissibility of.

The words "such statements" in the latter part of S 162 of the Crl. Pro. Code include oral as well as written statements to the Police and they cannot be given in evidence in the trial in corroboration of the prosecution witness.

Nugent Grant and *C. Sambasiva Rao* for Petitioner.

The Public Prosecutor for the Crown.

[END OF VOL. LIV]